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FOREWORD

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THE ALBANY LAW REVIEW

of

RECENT DECISIONS

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UNDUE INFLUENCE AND FRAUD IN THE PROCUREMENT OF WILLS

Undue Influence

The subject of wills and their validity is of the utmost importance to every man or woman for it is my impression that any person possessing any considerable estate has an inherent distrust of the statutes governing the distribution of property in cases of intestacy, and feels that he can do a much better job of distributing his property himself. Moreover, every such person is at least conscious that there is such a thing as a law of wills and is particularly anxious to comply with it, for they appreciate that when their will is offered for probate they will be in no position to explain it. Yet it is all too often the case that a will, which should contribute greatly to the mental tranquillity of the aging person, is indirectly the cause of the greatest unrest and unhappiness. This is a logical corollary of those traits of humanity which cause each beneficiary to feel himself entitled to the bulk of the estate, and many such beneficiaries are not too particular as to the means used to procure this end. Within reasonable bounds an attempt to reach this goal is legally proper, but any excessive activity in this field brings the case within the sphere of undue influence or fraud, and in such cases the courts will strike down the will. It is with these cases that I attempt to deal here.

This subject is an apt one for students of law because the rules governing undue influence and fraud in relation to wills are almost exclusively enunciated in the decisions of the courts. What few statutory pronouncements there are are general in their scope and are intended as merely declarative of the common law. Though undue influence technically refers to a coercion of the testator's mind by some other person and fraud includes the idea of another's deception of the testator; the subjects overlap to a considerable extent and it is virtually impossible to point to the dividing line in a great many cases, and the terms are sometimes used interchangeably, as the court said in In re Chinsky, 150 Misc. 274, "The border line between fraud and undue influence is extremely shadowy, indeed it has been held that undue influence is a species of fraud."

To have undue influence within the meaning of the law there must be some coercion whereby the wish of the testator is subdued and displeased, even though his judgment has not been convinced, nor his desire changed. What constitutes undue influence must be determined anew in every case, for the variable factors of the testator's power and ability to resist, and the amount and kind of influence exerted, necessarily differ in each case. The important thing, therefore, is to determine the power of coercion on the one hand, and the power of resistance of the testator to its influence, on the other. When the former is sufficiently strong to overcome the latter, you have undue influence. In any event, if all of the elements of undue influence are present the testamentary disposition procured thereby is undoubtedly invalid.

In order to have undue influence, there must be a testator who is susceptible to the domination of another; that other who is capable of controlling the testamentary action of the testator; the exertion by such person of influence of a nature which will coerce the testator into making a testamentary provision contrary to his desires; and a disposition actually resulting from the influence. Some decisions demand as a condition precedent to the existence of undue influence, the presence of a mentally competent testator, as was implied in In Re. Whitmarch's Estate, 133 Misc. 858. However, it would seem that the general rule, as stated in Phillips v. Jones, 179 Ark. 877, is that "the questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considers them together." At any rate, it is clear that the physical and mental condition of the testator is a relevant circumstance in determining whether the will resulted from undue influence, for one who is mentally weak is more easily coerced than one who is strong and healthy. Or, as the court says in In re Reuf, 180 A.D. 203, "A will enfeebled by age, infirmity or dependence might be bent by pressure which would not influence one in health and mental vigor."

The influence must necessarily be that exerted by some other person. The dreams and fantasies of the unfettered mind of the testator himself, or fears of displeasing the expectant beneficiaries cannot be said to constitute undue influence, for the court said in In re White's Will, 121 N.Y. 406, "Wills, however, do not depend for their validity upon the testator's ability to reason logically, or upon his freedom from prejudice." Thus, where a will was made simply because the testator thought he was directed to make a particular distribution of his property by spirit voices, or where the will was a direct result of the testator's belief in witchcraft, the case is not one of undue influence, Van Guysling v. Van Kuren, 35 N.Y. 70. Nor does a desire to comply with the wishes of a deceased husband, fearing his displeasure in the next world, constitute undue influence. And where a wife makes a certain will, fearing that her failure to do so will hasten the death of her aged and feeble husband who was exercising no coercion, there is no undue influence. (Warwick v. Zimmerman, 126 Kans. 619) In this case the court said, "Any influence, however exerted, is not undue or wrongful so long as it does not extend to positive dictation or control." It is universally stated that influence in order to invalidate a will must be exercised with the object of procuring a particular will, or a particular provision therein, for where the influence merely caused the testator to make the will, leaving him free as to its provisions, it cannot be said to be undue. As a rule the influence is exerted by the beneficiary himself, but a will may be invalid though the beneficiary took no part in the activities, and was even ignorant of the fact of the making of the will. (In Re Erickson's Estate., 140 Cal.App.520).

Since everyone is more or less swayed by his relationship and associations with other persons, it is not every such environmental influence that is undue. The usual test stated is that pronounced in Warwick v. Zimmerman, supra, in which the court provides that in order to have undue influence, the conduct of the

dominant party must be such as to destroy the free agency of the testator, or substitute another's volition for his. In every case the specific test is whether or not the desire of this particular testator was overcome, not whether an average testator's mind would have been coerced under the circumstances. It is not necessary that the coercion be absolutely irresistible, for the influence is fatal to the will if it is such that the testator could fairly say: "It is not my will, but I must do it." "The testator must act under such compulsion, coercion or restraint that his own free agency is destroyed. But advice, persuasion, solicitation, entreaties or importunities do not constitute undue influence. (Ginter v. Ginter, 79 Kans. 721). Nor are physical threats of violence necessary. But due to the wide divergence of the types of undue influence, no general, hard and fast rule can be laid down, and the best way of showing the position taken by the courts is by illustration.

Threats of violence, of litigation among children, of criminal prosecution (In re Brunor, 21 App. Div. 259) or to leave a sick testator, have all been held to constitute undue influence. Likewise, creation of a resentment toward the natural object of the testator's bounty by means of false statements, or an artful use of testator's religious beliefs may constitute undue influence. On the other hand, the influence will usually not be held to be undue, in the case of a spouse, for even where a wife has gained ascendency in the family by ligitimate means, such ascendency and influence has been held not to be undue even though the rest of the family was excluded from the will, in Gardner v. Gardner, 22 Wend. 526. The same general rule applies in the case of children where the testamentary provision results from the affection which the testator feels for them. Moreover, even though kind and considerate treatment may well be said to exert a powerful influence over an aged testator, the court held in In re Chinsky's Will, 150 Misc. 274, that "where mere acts of friendship and kindness are the inducing cause of the making of the will, no undue influence is shown." It has been held, however, in rare cases, that excessive flattery may constitute undue influence, but such cases are the exception rather than the rule. Moreover, hatred, dislike, or prejudice, though often the controlling motive of the will, do not constitute grounds for avoidance due to the fact that regardless of the motive, the will is clearly that of the testator, and the court will not inquire as to its wisdom. Influence of a general character is not sufficient to invalidate a will and the same may be said of mere advice, however colored, or persuasion. But importunity or threats of such a nature as to overcome the testator's power to resist, or assented to for the sake of peace and quiet have been held to constitute undue influence. (Emery v. Emery, 222 Mass. 439). Even the influence which results from immoral relationship on the part of the testator is not undue if it springs from affection rather than domination of the testator's mind. The influence of a mistress is not necessarily undue while, in some cases, that of a wife may be so regarded.

Or, as was said in In re Van Ness' Will, 78 Misc. 592, "A recognized or lawful influence may be exercised by the most abandoned person. It is not the character of the person exercising the influence which is a controlling circumstance, but the nature

and manner of the influence itself." If, in the last analysis the will is that of the testator, the courts will uphold it regardless of his motive in making it. (Matter of Mondorf, 110 N.Y. 450). The law will not condemn a disposition solely on the ground of immorality, or meretricious relations, but neither will it necessarily approve it because the status of the parties is socially approved.

Finally it must be shown that the influence resulted in the execution of a will which the testator would not otherwise have made, and that the influence was operative at the time of its execution, for if the mind of the testator, though once coerced, is free from domination at the time of the execution of the will, it will, of course, stand. But a will induced by undue influence does not become valid by reason of the fact that the testator failed to revoke it after the coercion has been removed. (In re Van Ness's Will, supra), though it seems that the failure to revoke should be some evidence of a want of undue influence, if the removal of the coercion is permanent.

In conclusion, it seems proper to point out that it is universally held that where a beneficiary sustains confidential relations with the testator, and also draws the will, a presumption of undue influence arises, and although this presumption is in no way conclusive, yet it often presents a serious obstacle to probate. The court, in In re Putnam's Will, 257 N.Y. 140, after mentioning the presumption, advises that "Attorneys for clients who intend to leave them or their families a bequest, would do well to have the will drawn by some other lawyer." It is also essential that the employment of another attorney be bona fide, and not merely a subterfuge, for one who participates in the procurement of a will is in the same position as the draftsman.

Fraud

To begin with, it would be well to draw the distinction between undue influence and fraud, in order to prevent confusion. In fraud, unlike undue influence, the mind of the testator is deceived rather than coerced and wherever there is any logical reason for the distinction, the courts recognize fraud and undue influence as separate objections to the validity of wills, and will deny probate for either or both reasons, as the case requires. The cases available on the subject of fraud are comparatively scarce, perhaps for the reason that a will which can be upset on the ground of fraud can also be denied probate on the ground of mistake, and since it is often difficult to show the intent necessary to the successful proof of the allegation of fraud, counsel prefer to base their objections to probate on the ground of mistake It therefore logically follows that any case which declares a will invalid on the ground of mistake is a clear precedent as to fraud regarding similar matters, though the converse is not necessarily true.

Fraud vitiates as much of the will as is affected or produced by it. It follows therefore, that if a part of the will is induced by fraud and the remainder would have been the same if no fraud

had been practiced, the latter will stand and the former will fall. The Court said in In re Carson's Estate, 184 Cal. 437: "There is nothing to show that the other beneficiaries were a party to Carson's alleged fraud. So, as to the other beneficiaries, their situation is that the testatrix died leaving behind her a duly executed instrument expressing her testamentary wishes in their favor. The will, then, is perfectly valid as to them." It is customary to divide fraud with respect to wills into two classes; those of fraud in the execution and those of fraud in the inducement. The first class refers to misrepresentations as to the character or contents of the instrument, while the latter designates falsification of facts outside of the instrument, or extrinsic matters, but which necessarily lead the testator to the making of a will which he would not have made if he were properly informed. Either kind of fraud invalidates the instrument, and it is generally conceded that there is no difference between these two sorts of fraud, either as to the essential elements required to be shown, or the effect of such proof. Nevertheless, it seems convenient to preserve the distinction because of the different types of questions which arise under each.

A will will be denied probate when the testator has been deceived by another as to the character or contents of the instrument, despite the fact that the instrument was executed in the form of a will. Thus, where a beneficiary induced the testatrix who was 94 years of age and under the influence of narcotics, to sign a will, which he told her was a burial permit, probate was denied since the proponent could not affirmatively establish, by clear evidence and satisfactory proof, that the testatrix had read and had understood the instrument. (Hildreth v. Marshall, 51 N.J.Eq. 241). The fraud, however, must necessarily be upon the testator, for misrepresentation to the witnesses as to the character of the instrument is no ground for avoidance of the will. But even if the testator was aware that he was signing a will, if its contents were misrepresented to him, it is not a valid will and should not be probated. (Rollwagen v. Rollwagen, 3 Hun 121). Moreover, where the existence of actual deceit is shown, it is apparently immaterial whether or not the testator had the opportunity or ability to examine it. Even the giving of advice as to the legal meaning of the terminology of the will may constitute fraud sufficiently to invalidate the disposition. But misrepresentations as to the contents, not induced by the beneficiary is not enough to secure judicial relief, though a few cases hold to the contrary.

The requirements of fraud in the inducement are substantially the same as those of deceit. The representation must be made to the testator either by the beneficiary or by someone acting in his behalf. They must be false and known to be such by the one asserting them. However, the court refused to deny probate in In re Janes, 87 Hun 57, where the testator was particularly prejudiced against married women, and where the beneficiary secured and maintained her position as his housekeeper by falsely representing that she was single, on the ground that the will stated the reason for the devise to her was "respect for her, and her service and kindness to me." The false representation must be as to a material matter (In re Janes,) and it must be with the intent to

deceive the testator, and to procure the will which actually resulted, or a particular provision thereof. Finally, it is necessary that the testator should have been deceived by the representation. The essential element in every case, and the one most difficult to prove is the intent to deceive, for unless such an intent existed, there was no fraud.

The person deprived of the testator's bounty by the fraud has no remedy in tort, for the injury is too remote and it seems that the mere possibility of receiving a bequest is too shadowy and uncertain to be dealt with as a property right. However, it seems that when one makes a promise or agreement to perform the wishes of the testator if he will let his present will stand as it is; or will agree to devise or bequeath his propety to the promisor, or will allow the property to descend to him as heir; or if by his silence he induces the testator to believe that he will do so, a court of equity will impress the property in hands with a trust ex malificio, or a constructive trust, in favor of the person or object who would otherwise have benefited by the will of the deceased. (Amherst College v. Ritch, 151 N.Y. 282). The court flatly states this doctrine in In re O'Hara, 95 N.Y. 403, where it says: "Equity acts in such a case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the devisor which equity will not endure. If equity will not touch such a devise by putting a trust for the heirs at law and next of kin upon the fund in the hands of these legatees, the road to an evasion of our statutes and to the temptations of necessity or greed will be left wide open. If we sustain this we admit that any statute may be evaded, and that equity cannot redress the wrong." Moreover, if the devise or bequest was to several on the promise of part in behalf of all that the trust would be executed, those who made no promise cannot accept the bequest and repudiate the trust. (Amherst College v. Ritch, supra.)

The courts will usually allow the introduction of parole or or extrinsic evidence in order to establish that a fraud has been perpetrated. The declarations of the testator are competent evidence for this purpose, but they are not competent in an action for a construction of the will before a surrogate. The court says in Matter of Keleman, 126 N.Y. 73: "All the extrinsic facts become admissible to establish fraud in an action in equity to impress property with a constructive trust, but such holding is very remote from holding such evidence admissible in a Surrogate's Court upon a mere question of testamentary construction." Moreover while it is true that fraud will never be presumed, yet it is not absolutely necessary to show its existence by any positive testimony, for it is usually only by circumstantial evidence that fraud can be brought to light. So, if the testator was blind or unable to read, or if he was aged and infirm, or if he was for any other reason liable to be imposed upon, the burden is shifted to the proponent to show that no fraud existed. This is especially true if the disposition was grossly disproportionate in favor of the one having the opportunity to deceive the testator. In Jones v. Simpson, 171 Mass. 474, a will giving the bulk of the decedent's estate to the son who drew it, and which was not made known until

after the death of the mother, was denied probate, the court saying: "Whether the contents of the alleged will were known to Mrs. Simpson, and whether they expressed her testamentary intentions depend wholly upon the testimony of the son in whose handwriting the instrument is. It is impossible for us to believe his account of the interviews between himself and Mrs. Simpson resulting in the execution of the instrument."

The majority of opinions seem to hold that when only a part of a will is affected by undue influence or fraud, that part will be declared invalid, but the remaining provisions will be enforced. However, if the two portions are so interrelated that to give effect to one without the other would probably do violence to the intention of the testator, the entire will should and will be denied probate. This doctrine is clearly stated in In re Maguire, 105 Misc. 433, where the court says: "Reason and authority compel the conclusion that parts of a will may be admitted to probate, while another part is denied probate on the ground of either fraud or undue influence. Every suggestion of righteousness and good sense makes for the avoidance of a portion of a will which for any reason is found not to have been within the actual purpose of the testator.

There would be a failure of justice if the same considerations which would clearly require the entire denial of probate should be helpless in the face of an equal wrong entirely limited to a single feature of the will."

EDWARD ARTHUR TRACY

HOW VULNERABLE IS A COUNTY?

The contemporary importance of negligence actions being admitted, a recent decision by the Appellate Division in the Fourth Department in Willcox v. County of Erie, 252 App. Div. 20, has given rise to an interesting question as to the vulnerability of a county in its private or proprietary capacity, to attack by a civil suit.

In the Willcox case the court makes the statement, "Were the functions thus performed by the county governmental and public, or proprietary and private? If governmental, immunity from the legal consequences of fault must follow; if proprietary liability must result." This statement is a distinct departure from the established rule as to counties; or at least it is the first time that the liability of a county under these conditions has thus been admitted by the decision of a court of record in our State. Its accuracy is the subject of this article and if found to be good law a new field of negligence actions has appeared.

Let us first review the liability of cities, villages and towns in this respect. It is fairly well established by this time that each of these three classes of municipal corporations are liable when acting in a private or proprietary capacity, while by our common law they are not responsible for the acts of their agents when involved in functions of a public or governmental nature. When acting privately they may be acting for the benefit of their citizens but since they are not acting for the benefit of the public generally they must answer for their wrongs. However, when they are engaged in acts which are determined to be of a governmental nature their agents are not agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large and the corporations are not responsible. Here their sovereignty is their shield. It has long been a doctrin that the sovereign can do no wrong, although in recent years this has been seriously questioned, and a long line of decisions support the rule with dispute arising only as to whether a private or a governmental function was involved. It is sufficient then for our discussion to admit that the liability of cities, towns and villages, when they are engaged in private endeavor, has already been established.

This has not, however, been the rule for counties. These in the past have been distinguished by political and legal minds as being merely subdivisions of the state sovereignty and as such were only political entities having no private character of their own. This question arose as early as 1892 when a County Law was passed which for the first time designated counties as municipal corporations. The first case to arise was Hughes v. County of Monroe, 147 N. Y. 49, but it was held there that since the injury occurred before the Act was passed, there could be no question for the court; because at that time the county was necessarily at most a quasi-corporation, and as a political division of the State was immune from suit. Closely following this case, however, was Markey v. County of Queens, 154 N. Y. 657, in which a great deal of important law was written.

It was held in the Markey case that maintaining a bridge by a county was strictly a governmental function and that therefore the county was immune. The court went on to state that there is a real distinction between counties as civil divisions of the State for the purposes of local government and a chartered municipal corporation in respect to their liability for corporate acts.

In 1898 the appellant's counsel was attacking the reasoning that there should be any distinction between the two governments but the court did not agree with him. They unanimously asserted that the distinction rested upon the established conditions of State government and that it must continue to rest there until the Legislature decided to change it by statute. They held further in the Markey case that the law of 1892 declaring counties to be municipal corporations did not subject them to new liabilities, but that their liabilities remained the same as they had been before. They explained that the reason for making counties municipal corporations was to make it possible for others to sue them as legal entities and thus to do away with the necessity of suits against the Board of Supervisors. They were very careful to say, "that the distinction between cities and counties lies in the fact that cities are granted the power to own and manage private property and to have franchises, while a municipal corporation is created for the purposes for State government and to exercise, as one of its civil divisions, certain of its political powers." Here we find a very clear and unmistakable line drawn by the Court of Appeals over forty years ago.

It is in recent years that some criticism of this distinction has developed. The argument of those who object to it is, - that if the county does undertake a private function, which the Legislature can authorize it to do, why should it not be held liable with the same reasoning that we hold cities, towns, and villages? Also, we find those who would argue against the rule of non-liability of cities and villages, when these cities and villages would shield themselves behind immunity as to governmental function after they have committed a real wrong against some individual citizen. We must determine whether these attacks have been successful enough against the Markey case to make the assertion in the Willcox case good law.

In the Willcox case the court cites five cases in support of their contention of county liability. The first two of these are the Hughes and the Markey cases, just discussed. These not only fail to support this contention but they are expressly opposed to it. They hold that a county is liable only by statute. (Our County Law §6, provides a liability for the negligent maintenance of roads, highways, bridges, and culverts; and §6b allows the Board of Supervisors to permit suit in any situation in which they think that it is justified, but we are not concerned here with statutory liability.) The third case is Nichitta v. City of New York, 223 App. Div. 428, but this is a suit against a city and it contains no statements as to the liability of a county. It states only that it is a governmental function to carry nurses to school in a city ambulance. This, under the latest cases, might be questioned. The first three cases seem to be of little value in supporting an assertion of county liability for exercising a private function.

However, the fourth case, Cleveland v. Town of Lancaster, 239 App. Div. 263, does contain statements which might be interpreted to support the assertion in the Willcox case. Here a town is being sued and the question is whether it can be held for the negligent maintenance of a traffic light at an intersection, the contention of the plaintiff being that a town could be held to the same rules of tort liability as a city or village. On this point, the court agrees with the plaintiff and in the discussion points out that while originally towns and counties were classed as political divisions of the State, the line drawn between them and cities and villages has largely been wiped out. The reasons which they give for this is that with the growth of towns in importance and population the Legislature has from time to time given towns quasi-private or proprietary functions. This case, as it states the law regarding the liability of a town, is undoubtedly correct. They are now classed with cities and villages and held liable under the same circumstances. This may not, however, be true of counties. We are asked to give full faith and credit to the statement, "the distinction between counties and towns on one hand and cities on the other has largely been wiped out." While this is very true as to towns, for the practical reasons given, it may be just as untrue as to counties for the very same practical reasons. Towns have grown in importance and population. Towns have been authorized by the Legislature to carry on an increased amount of private functions. Because of this, they have changed their classification. Counties, on the other hand, have not been given a proportionate authorization by the Legislature to carry on proprietary functions and their classification does not necessarily have to follow the classification of towns. In this Cleveland case they are discussing the liability of a town alone and the liability of a county was not in anyway involved there. The general words which classified counties with towns was relatively unimportant and irrelevant to the issue involved. It is only the statement in the case which attempted to change the classifications of counties and since it was immaterial I think that it would need the support of other cases before it could be used to predicate the liability of a county upon it.

The last case is Miller v. Town of Irondequoit, 243 A.D. 240, and in this case a fire district is being sued for the negligence of a driver of a fire truck. For the purpose of our discussion the difficulty is that a fire district is not a county. Nor is it a town. It has no legal entity of its own and a plaintiff must sue the commissioners who levy a tax upon the district to pay the judgment. The case says nothing of the liability of a county and decided that fire protection is a governmental function.

Review of these five cases cited in the Willcox case established four points. First, that in 1892 our courts laid down a distinguishing line between counties on one hand and cities on the other. Only the latter could be sued. Second, that no governmental agency is liable when engaged in a public function. Third, that towns have been changed from a classification with counties because of their change in importance and population and because they have been given an increased amount of private functions to perform. They are now classed with cities. Fourth, that really

to support the assertion of the Willcox case we must find something outside of the cases cited under it.

Before the Willcox case was handed down, there appeared an annotation in 101 A.L.R. 1166 in which the liability of a county was discussed and the opinion expressed there concluded that the states were divided upon this subject. They found that some States (Missouri, Hawaii, and Indiana) held that the distinction between cities and counties was immaterial and thus a county could be sued if it had engaged in private endeavor. Other States (Pennsylvania, California, Illinois, and New Hampshire) insisted that a county was only a division of the state and as such could never be sued without consent. After reviewing the New York cases the annotation concluded that although we had clung strictly to the distinction that our cases had sometimes used a language indicating a willingness to apply tort rules of cities to counties. As an example of such language they mention the Cleveland case which we have discussed. The one point that this annotation does make, which has poignant significance for our subject, is that in every case where it has been decided that the county was engaged in a private function it has been held liable. We have not had such a case in New York.

In the Willcox case, the Legislature had given the county authority to create and maintain a public park. The county had erected a toboggan slide and the plaintiff was injured and sued on the theory of negligent maintenance. The court finally determined that this was only a governmental function exercised for the benefit of the public as a whole and that therefore the county was immune from suit. If they had not added to this that the county, however, would have been liable if it had been a private function we would have no reason to discuss their ruling. On appeal, the Court of Appeals (264 N.Y. 568) affirmed the dismissal but specifically on the ground that there had been no evidence of negligence. Their pointed refusal to consider any other point of law involved in itself shows that the assertion by the Appellate Division is not to be accepted without question. Later the Willcox case was cited in two cases which followed it as authority for the proposition that a municipality cannot invoke the shield of governmental immunity when acting in a proprietary capacity. These were both suits against cities - Babcock v. City of Oswego, 165 Misc. 105, and Duren v. City of Binghamton, 172 Misc. 583. Since they were not against counties the Willcox case was proper authority for them to use.

The Duren v. City of Binghamton case is a very interesting one in itself. While holding that the city was engaged in a private function and thus was vulnerable, the court goes on to point out that the ancient rule that a sovereign can do no wrong has not only been abolished in many particulars by statutory enactment, but that it has been seriously questioned and condemned in unsparing terms by eminent jurists and distinguished legal authorities (citing among others, justices of the Supreme Court of the United States. "The present tendency is against the rune of non-liability", writes Justice McNaught. He points out most strongly that even where activity of a governmental character is conceded there is

much opinion to the effect that the municipality should not be allowed to inflict a positive and direct wrong and not be responsible for a redress of that wrong in our courts. It will be well to keep such a tendency in mind when discussing the possibility of a county's being sued in the future and being held liable because it is judged that it was engaged in a function of a proprietary nature. The argument that a county engaged in a private function should be liable to the same extent as a city engaged in the same kind of a function, when viewed from its practical side, is a very potent one. Its proponents simply say, "If we hold a city, a town or a village, why in the world shouldn't we hold a county liable too?" In the face of this growing tendency against the rule of non-liability, this may be a very difficult question to answer with the old arguments that a county is to be considered as merely a subdivision of the state and therefore can never be sued. This is a difficult question to answer especially in view of the fact that the Legislature can give authority to counties for as many private functions as it has given to towns which admittedly were in the same classification with counties at one time, and in view of the fact that county immunity has already been reached in specified cases by statutory provisions. Public displeasure with the absolute immunity of counties has caused the Legislature to provide that counties can submit to suit of they think it wise to do so. When the Legislature gave to towns the right to exercise functions of a proprietary nature that was all that was needed to change their classification and to establish their tort responsibilities within the rules as applied to cities and villages. This should be all that would be required to change the classification of counties and to make them responsible to the same rules. It becomes necessary therefore in order to find this point of "change over" to determine whether the acts which the Legislature authorizes the counties to perform are proprietary or governmental in their nature.

The decision of what acts are to be considered as private rather than governmental is a purely academic one. It is a question of law to be decided in the mind of the trial judge and upon this point individual judges may differ. There are no arbitrary lines to be drawn nor static sets of classification to be attempted. The line between private and governmental function has been a shifting one. The decision in each case has rested upon the particular circumstances involved there. Here again the tendency against the rule of non-liability becomes important. In an increasing number of cases involving the liabilities of cities, towns and villages there are decisions holding the functions to be private. These are so close to decisions in the past, holding them to be governmental, as to defy distinction. It would appear that judges are growing more and more unwilling to allow these municipal corporations to avoid responsibility for a positive wrong by the shield of debatable governmental function. If judges are showing this liberalism when cities, towns and villages are involved, we may find in the future decisions declaring the acts authorized to counties to be private, rather than holding them to be governmental as they have always done in the past. When acts so authorized are held to be proprietary it will be logical to argue that counties have changed their classification.

There have been cases in other States where counties have been held to exercise a private rather than a governmental function. In a Missouri case it was held to be a private function when the county laid water pipes from the public main to an insane asylum. In a case from Hawaii, the court said that it was private when a county car was used to transport an employee to another part of the city. In a Pennsylvania case, the maintenance of a water company building was not held to be governmental. (See 101 A.L.R. 1166, supra). If we admit the tendency of modern judges to regard the activity of municipal corporations as private rather than governmental, it will serve us well to remember that in every case where the judge has decided that the function was private the county has been held. The forcefulness of plaintiff's arguments, once the private character of the function has been determined, has always turned the tide against the county.

Here in our own State in the recent case of Augustine v. Town of Brant, 249 N.Y. 198, the town was authorized to maintain a park just as the county was authorized in the Willcox case. And because the town charged an admission fee to visitors from outside its limits it was held to be a private rather than a governmental function. The court said that it was not acting as a sovereign in maintaining the park because it was for the benefit of the residents of that locality and not for the benefit of the public generally. Had the county in the Willcox case charged admission for outside residents in the same way I have no doubt that the Appellate Division would have held the county liable for exercising a private function. That was their expressed frame of mind.

However, it is my opinion that the Willcox case has gone too far in handing down as an absolute rule that the county will be held. It was not necessary for their decision, and the court has crystallized into a statement of law what has heretofore been a privately asserted but untested tendency. It is true that there is much to the argument that there is no real distinction between a county and a city, from a practical viewpoint, when they are both exercising private functions. It is true that in other States the counties have always been held liable. It is true, also, that there is a tendency in New York to avoid the shield of governmental immunity when a wrong has been done. Yet we have had a distinction drawn between the two corporations by legal minds and in legal decisions for more than forty years. There have been many attempts to sue a county but not one of these has ever succeeded unles there had first been statutory provision for the suit. We haven't had one judge who was willing to hold that the function of a county was proprietary in nature. It may be that our courts will be unwilling to disregard the county as a division of the State which can never be sued without statutory provision to that effect. If this is true the assertion in Willcox v. County of Erie is misleading.

ARTHUR ARNOLD ARMS, JR.

THE MERCY VERDICT OF A JURY

In 1937 the Legislature enacted §1045-a of the Penal Law, as follows:

> "A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

Section 1044 refers to felony murders. And this section gives offenders of that section a possibility of life imprisonment rather than death. But, since the enactment of this section, there has arisen considerable doubt concerning the interpretation of the statute.

The major controversy arises as to whether a recommendation of the jury for life imprisonment is mandatory or discretionary with the court. In the clause, "the court MAY sentence the defendant" - does "may" imply "must" or "permission"?

In the recent case of People v. Ertel, 283 N. Y. 519, there was a discussion of this question. The defendant was found guilty of murder in the first degree. In his appeal, the defendant maintained that the trial court erred in its charge. The court in this charge was concerned with the recommendation of mercy permitted under §1045-a.

The Court of Appeals held that the charge had not been prejudicial, that the trial court was warning the jury that the recommendation must be based on reasoning and not mere sympathy. Then the opinion goes on to state that "Even had the jury made a recommendation it would not have been binding on the court in sentencing the defendant." And People v. Gatti, 279 N. Y. 631 is cited in support of this proposition.

In People v. Gatti, supra, the appeal was upon propositions other than the one before us. The defendant claimed an improper charge upon the question of a recommendation. The counsel for the defendant asked the trial court to make specific charges regarding a disagreement in the matter of a recommendation for mercy. The court refused to make the charges but warned the jury against a "piecemeal" verdict. It said that they could not bring a recommendation by a divided jury. At this point there was an exception taken by the defense and later formed a major part of the appeal.

The jury was confused as to the mercy recommendation and twice returned for further instructions. On the second occasion, they asked whether a recommendation for life imprisonment would be binding upon the court. The court charged, "That question has not been passed upon by the Court of Appeals. Inasmuch as the question has not been put before me for decision as yet, I am not going to tell you gentlemen how I regard the law. - And I say I

will not reply to that question because I have not made up my mind as to whether it is mandatory or not." The jury then found the defendant guilty, with no recommendation for mercy.

It can be seen that at no time has the trial court here decided that a recommendation by the jury may be set aside by the court. Rather the court says it has not decided whether it is discretionary or mandatory. The affirmance of this case rejected the claim of the defense that there was an error in the charge of the trial court But it is not authority for the proposition that a recommendation could have been set aside by the trial court.

In his appeal brief, counsel for the defense, Mr. Liebowitz, argued that the court erred in its charge when it failed to decide whether a recommendation for mercy would bind the court. That this would have avoided the confusion of the jury. And that the court's indecision was prejudicial. But here again it is the charge that is the basis of the appeal. And the Court of Appeals, affirming without decision, passed up an opportunity to intimate what their interpretation of the statute would be. This case can hardly be cited as support for the dictum in People v. Ertel, supra, since there is no interpretation of the statute either in the lower court or by in erence on appeal.

There are, however, three equally authoritative decisions of lower courts, which trial justices may use in determining what interpretation to put upon the statute.

In the case of People v. Smith, 163 Misc. 469, the Supreme Court of Erie County found the first conviction under §1045-a. The jury recommended life imprisonment, and the court listened to the arguments of counsel as to whether to adopt the recommendation or sentence to death.

The court said that "the verbiage of the statute is such that the discretion of sentence is left with the trial court if the jury makes a recommendation for life imprisonment. In practically every other crime the trial court has had the burden and task of choosing the sentence. To that task is now added the sentence of persons engaged in felony murders when the jury recommends life imprisonment. Like all other matters in which discretion is involved, the court should have a basis for such discretion. If the death sentence is to be avoided in the case of one who in a group felony is a participant in a killing, then apparently there is no reason why it should not be avoided in the case of a person of the mental type and former history of the defendant herein."

The court seems to interpret the statute as bestowing a discretion upon the court, conditional upon the recommendation of the jury. But after the jury exercises discretion in recommendation of leniency, the court must have some basis or reason other than the mere recommendation of the jury upon which to sentence to life imprisonment.

However, in People v. Ray, 172 Misc. 1004, the court said, "The fact that the court cannot properly direct or control the ab-

solute right of the jury to recommend life imprisonment and that its recommendation is a part of its deliberative verdict gives to such recommendation more the nature of a command than a request. The primary obligation rests upon the jury because without its definite, unanimous finding the court could not sentence the defendant to life imprisonment. It follows that the court is not required to give its reasons for following such finding. The court should follow the recommendation in every instance save where the recommendation is improper, unduly influenced or without any basis in fact or circumstance. Viewed in that light the court in the instant case has followed the recommendation of the jury and sentenced the defendant to imprisonment for the term of his natural life.

Here the court gives greater weight to the recommendation of the jury. Whereas, in People v. Smith, supra, some reason had to exist in favor of following the jury's recommendation. Here, the court feels that the recommendation itself is sufficient and in the absence of contrary circumstance the court should follow the verdict of the jury.

But here again the court places a discretion in the court. "The court will take judicial notice of the fact that although a jury's recommendation for leniency or mercy is not binding on the court yet for years the practice has been nearly universal to follow such recommendation." The court seems to be taking judicial notice of the very point in issue - whether the statute is mandatory or discretionary.

However, there is a contrary holding in the case of People v. De Renna, 162 Misc. 582. This was a county court decision resulting from a conviction of a felony murder under §1045-a. The jury's verdict was guilty, with a recommendation of life imprisonment. The defendant appeared for sentence and the People urged the court not to adopt the recommendation because of the peculiar circumstances surrounding the case. The counsel for defense maintained that the sentence was not within the discretion of the court but that the court must adopt the recommendation of the jury. The court sustained the viewpoint that sentence is mandatory in such a verdict.

In the court's opinion the history of §1045-a is examined to interpret the intent of the Legislature. On January 6, 1937, Governor Lehman sent to the Legislature recommendations for changes in the Penal Law as a part of his anti-crime program. One of these proposed changes concerned the punishment for a felony murder. He denounced the existing law under which all the accomplices involved in a felony murder must be acquitted or sentenced to death irrespective of their respective responsibility for the killing. The verdict must be either acquittal or murder in the first degree, whereas, in other cases of murder the jury may bring in verdicts of murder in first or second degree, or manslaughter. The result is that juries are faced with condemning to death a man remotely responsible for the killing, or letting him go completely unpunished.

His proposed change was: "I would empower a jury to accompany any verdict of guilty with a recommendation of executive clemency

in which case the sentence shall not be death, but imprisonment for life. My reasons for this recommendation are two-fold; the first is that it will make it easier for the jury to bring in verdicts of guilty in felony murder cases. In the second place, it will permit the jury to fit its verdict to what it may consider to be the varying degrees of moral guilt of the persons involved in the same crime."

This recommendation was followed by enactment of §1045-a to take effect March 17, 1937.

The court noted from this recommendation that the Governor would bestow no discretion upon the court, but rather upon the recommendation of mercy, automatically "the sentence shall not be death but imprisonment for life."

The question before the court was of course not the intent of the Governor, but whether the Legislature in enacting §1045-a had the same intent. The language of the statute is that "Upon such recommendation the court MAY sentence the defendant to imprisonment for the term of his natural life."

The court said that "may" in the ordinary sense means discretion, but pointed out that in its legal sense it has frequently been construed to mean must or shall, especially in driminal cases. The court quoted Black in his Interpretation of Laws, to the effect that:

"It is well settled that may in any statute is to be construed as equivalent to shall or must when the public interests or rights are concerned or when the public or third persons have rights de jure to claim that the power granted should be exercised."

In interpreting the statute, the court said, "the language employed says [upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life], but it does not say or in the alternative the court may sentence him to death. Is that to be implied? Nor does the language employed use the words that the court IN ITS DISCRETION may sentence the defendant to imprisonment for the term of his natural life. If the Legislature had intended the use of the word MAY as permissibe, would it not have clearly indicated such discretion?"

"Where a fair interpretation of the statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provisions to be essential to the validity of the act or proceeding or when some antecedent prerequisite conditions must exist prior to the exercise of the power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory."

"In the case at bar, the prerequisite condition before the court could impose sentence was the jury's verdict, and once the jury having rendered its verdict under the language here employed, the power to be exercised becomes mandatory."

"A rule of law on construction of legislation, well recognized, is that it must never be presumed that the Legislature intended a vain thing, but the construction must always be such as to render their enactments effective."

"In this connection, it may be argued that, if the intention of the Legislature was to vest in the trial judge the discretionary power of fixing the penalty in a felony murder case, there would be no necessity of requiring a jury's verdict with a recommendation of life imprisonment."

In other words, the statute could simply provide that in a felony murder case, where a jury found a defendant guilty of murder in the first degree, a judge would have the discretion as to what penalty should be imposed. In the case under consideration, the Legislature provided that the jury should have the discretion and that they have the right to find the defendant guilty of either murder in the first degree or murder in the first degree with a recommendation of life imprisonment.

The court felt that after a jury deliberates for many hours as to what its verdict should be, that verdict is not merely a suggestion or recommendation which the court may lightly disregard. That the recommendation is just as important a part of the verdict as is the word "guilty." It is a mandate to the court that the punishment should be life imprisonment. To have a judge charge the jury that they may bring in a verdict recommending life imprisonment and then, after the jury so decides, allow the judge to disragard that verdict, would appear illogical. It would, according to the court, weaken the confidence of the jury in the court, and the very mischief that this legislation was designed to prevent would not be accomplished.

The court recalled that the statute was designed to overcome the reluctance of juries to bring in verdicts of guilty in felony murder cases. It argues that when the juries of this State learn that their verdicts are not being enforced and that the judge may, and does frequently, disregard the verdict and impose the death penalty, the evil which this statute was designed to cure will again manifest itself.

From these arguments the trial court here decided that the words "MAY be sentenced to life imprisonment" are mandatory and the trial judge is without discretion or power to impose any other sentence not in conformity with the jury's verdict.

It might be said that this case of People v. De Renna, supra, is the very situation which Governor Lehman had in mind when he recommended the new section. The defendant and two accomplices were in the act of committing a robbery when the police arrived. One accomplice escaped and was never brought to trial. The other accomplice was killed in the shooting which ensued. According to the evidence, the defendant had no gun and was in no way responsible for the actual killing for which he was held. But being the only remaining wrongdoer he was held for murder.

Thus we see that there are three lower court decisions which future trial justices may follow on this proposition. First, the

case of People v. Ray, supra, supported by the dictum in People v. Ertel, supra, to the effect that MAY means complete discretion in the court; second, the case of People v. Smith, supra, giving the court discretion basued upon a reasoning other than the mere recommendation of the jury itself, and third, People v. De Renna, supra, making it mandatory for the court to follow the jury's recommendation.

It would seem to this writer that the most logical course would be the latter. It is quite apparent that the Legislature was attempting to adhere to the recommendation of the Governor in this statute. And that they intended to take the responsibility for punishment from one man and place it upon the jury as a part of its verdict. And that there was the secondary intent of assuring reticent juries that a man convicted with this recommendation attached, would not be sentenced to death. In People v. Gatti, supra, the jury specifically asked whether the court would be bound by their verdict.

All the above cases stress that the discretion of the jury should be "free and uninfluenced except by facts and circumstances in the case." (People v. Ray, supra.)

In State v. Ellis, 102 Ohio State R. 21, the court says, "Whether or not a recommendation of leniency shall be made upon finding an accused guilty of murder is exclusively in the discretion of the jury."

Some decisions even imply that the basis may be reasoning apart from the evidence but not mere prejudice. (People v. Gatti, supra).

The courts are stringent in restraining the judges from interfering with this free discretion of the jury and recommend that the charge be put in the words of the statute. (People v. Ertel, supra) Having so zealously protected the free mental operations of the jury in deciding upon a recommendation, is it logical that it be then referred to the trial court for final discretion? It is true that "MAY" in ordinary circumstances implies discretion. But Black in his Interpretation of Laws, says, "When a statute grants a new right or power or provides a new remedy, not existing at common law, but wholly created and regulated by the statute, and prescribes the mode of enforcing or pursuing it, its terms are mandatory and not discretionary, though couched in language which is permissive when taken in its ordinary signification."

In the case of People v. Divine, 5 Parker Cr.R. 62, the court held that "may" means "must." The statute giving court jurisdiction states, "The court 'may' be held by any three of the said police justices." There were only two justices sitting at the time of the defendant's trial. The court held "may" means "must" and that there was no jurisdiction.

In State v. Barry, 14 N. D. 316, the defendant was convicted of second degree murder with recommendation by jury for sentence less than that prescribed by law. The court ordered a new trial and defendant pleaded prior jeopardy. In North Dakota the statute says that if punishment, imposed by jury, is under limit prescribed by law for that offense, "the court may receive the verdict and pro-

nounce sentence for lowest limit prescribed by law. On appeal, it was urged by the district attorney that this was not mandatory but permissive and court may act or not at its option. The court said, "This section clothes trial judges with power to pronounce judgment upon verdicts like the one in question. But does it do more than merely create power? Does it not in fact impose duty? We are clear that it does. True the language in which the power is conferred is permissive in form, but that fact is not controlling."

This proposition of "may" in criminal statutes is also discussed in People v. Smith, 253 Ill. 649. In Illinois there is a criminal statute which provides that boys of certain ages "may be sentenced to the reformatory." The court held that it was mandatory upon the court to sentence to a reformatory. "The word 'may' in a statute will be construed to mean shall or must whenever the rights of the public or of third persons depend upon the exercise of the power to perform the duty to which it refers."

And in Henderson v. People, 165 Ill. 607, the court interpreting the same statute said, "The law therefore requires that he should be sentenced to the reformatory."

It is also important to consider the statutes of other States in determining the intention of our Legislature. Investigation shows in 1928, some ten years before the New York Legislature enacted §1045-a, thirty-three other American jurisdictions had replaced the common-law procedure with a somewhat uniform statute, by investing the jury with the power to determine the sentence.

The Criminal Code of the United States gives juries the power to substitute life imprisonment for capital punishment in rape and murder cases - 18 U.S.C.A. §567.

Is it to be urged that our Legislature intended to frame a statute that differs so radically from the statutes of these other jurisdictions? It would seem more logical than our Legislature had these other statutes in mind. - And in enacting §1045-a, intended to conform to the trend in these other jurisdictions.

This ambiguity will eventually be clarified, either by judicial interpretation or legislative act. In the past session there was introduced a bill to establish the intent of the Legislature. If we wait for judicial interpretation to settle this question, it may be some time. The Court of Appeals cannot act until the opportunity presents itself. The situation must arise in which the trial court sets aside the recommendation of the jury, and sentences the defendant to death. Then upon appeal by the defendant the Court of Appeals may determine whether this section is mandatory or discretionary.

JOHN EDWARD DICKINSON

IMPAIRMENT OF THE OBLIGATION OF CONTRACTS

Many lawyers of this State were of the opinion that the Court of Appeals would decide the case, National City Bank v. Gelfert, 284 N.Y. 13, differently. This case involved the constitutional prohibition against the impairment of the obligation of contracts.

Article I §10 of the Federal Constitution provides: "No State shall*****pass any Law*****impairing the Obligation of Contracts."

The problem confronting the Court of Appeals in this case was whether §1083 of the Civil Practice Act, as amended by Chapter 510 of the Laws of 1938 (effective April 7, 1938) could be constitutionally applied to proceedings upon the foreclosure of a mortgage executed prior to its effective date.

Section 1083 of the Civil Practice Act provided, at the time the mortgage was executed and the money advanced, that if a person who was liable to the plaintiff for the payment of the debt was made a defendant in the action and had been personally served, final judgment could award payment by him of the residue of the debt remaining unsatisfied, after the sale of the mortgaged property.

Section 1083, as amended by the Laws of 1938, provides in substance that a motion for a deficiency judgment must be made, otherwise the proceeds of the sale, regardless of the amount, shall be deemed in full satisfaction of the mortgage debt, and no right of action of any kind shall exist. It provides, also, that upon such motion for a deficiency judgment, the mortgagee is required to credit on the mortgage debt either the price obtained or the amount which the court might determine upon affidavits or otherwise, to be the fair and reasonable market value of the mortgaged premises, whichever is higher.

The facts of the National City Bank v. Gelfert, supra, are as follows: The defendant's decedent excuted, on December 29, 1932, a mortgage to the plaintiff bank to secure payment of a loan. Upon default, the plaintiff bank foreclosed the mortgage. The amount due the bank was $18,401. The premises were purchased by the bank at the foreclosure sale held on December 16, 1938, for $4,000. When the bank applied at Special Term for an order confirming the referee's report of the sale and for a deficiency judgment, the defendant's counsel applied by cross motion for an order, under the amendment of §1083, fixing the market value of the property foreclosed on the ground that the sale price was wholly inequitable. In support of his cross motion, the executor submitted affidavits in which the mortgaged premises were appraised at $11,000. The defendant's motion was denied and the deficiency judgment was confirmed. The Appellate Division reversed upon the ground that §1083 as amended barred the bank's right for a deficiency judgment since the bank had not made application for such judgment in conformity with the section.

The Court of Appeals, in a six-to-one decision, held in this action that §1083 as amended could not constitutionally be applied retroactively to a mortgage executed prior to its effective date would be in contravention of the constitutional pro-

hibition against the impairment of contracts. It took notice of the point so strongly stressed by the plaintiff bank, i.e., that this amendment was not passed as an emergency measure, but rather to make certain provisions of themoratory mortgage legislation (C.P.A.§1083-a) permanent.

The first issue confronting the court was whether or not the Legislature can modify modes of procedure and change existing remedies without violating the constitutional prohibition as to impairment of contracts.

Both the majority of the Court and the dissenting member start on the premise that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. They agree that the Legislature may not withdraw all the remedies, and thus, in effect, destroy the contract; nor impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract. They agree that the Legislature may modify and change existing remedies, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains, or is given, by means of which a party can enforce his rights under the contract.

The second issue must be, therefore, -did a substantial remedy remain to the plaintiff by means of which he could enforce his rights under the contract?

On this issue the majority of the Court and the dissenting justice arrive at different conclusions. This is the decisive issue of the case.

The majority of the Court is of the opinion that the plaintiff bank has no remedy co-extensive with that afforded by the former §1083. In arriving at that conclusion the Court states: "Apart from ourmoratory mortgage legislation, a mortgage of real property may still recover judgment for the mortgage debt as if no mortgage secured it. This remedy of an action cannot be deemed to be fair equivalent of the remedy afforded by the former §1083, inasmuch as the judgment debtor's equity of redemption cannot be sold under an execution issued upon a judgment for the debt." Mr. Justice Loughran points out that our statutory system of foreclosure from the beginning has prohibited a second action to recover a deficiency resulting on a foreclosure sale. He cites §1078 of the Civil Practice Act which provides: "While an action to foreclose a mortgage upon real property is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." In supporting the conclusion that this remedy is not co-extensive with the old §1083, Justice Loughran states, "****in our judgment the limited judicial discretion permitted by §1078 could not be made an effective instrumentality for the replenishment of the rights which §1083 has now taken away from mortgagees." He points out that it is a general rule of the Court that it will not give leave to bring such an action save in exceptional cases.

Mr. Justice Lewis in his opinion states that he arrived at a different conclusion; that in reaching that conclusion, he was influenced by an examination of change in remedies for the collection of a mortgage debt made available to a mortgagee at common law and under statutes prior to this amendment. He does not contend that the right of the plaintiff bank to sue on the debt as if no mortgage had been given is co-extensive with the rights secured to it by §1083. He holds merely that the remedy provided by §1078 is co-extensive with the rights of the bank under §1083. He points out that §1083 was passed merely to avoid the necessity of two actions to collect the mortgage debt.

In Rutherford Realty Company v. Cook, 198 N.Y. 29, 33, it was held that before the enactment of this section, a mortgagee to collect a deficiency was compelled to resort to an action at law after the sale under a decree in equity. Judge Cullen stated that this course may still be pursued, though leave of the court is necessary for the institution of the second action. Mr. Justice Lewis points out that no act of the Legislature, except the moratory mortgage legislation, has abolished this remedy. He states that he sees nothing in this present amendment which takes away this remedy. The majority of the Court assumes without deciding that this amendment does not take away the remedy under §1078.

Justice Lewis argues that since this was the remedy in existence before the enactment of §1083 and since it still exists, any modification of §1083 cannot affect the contract rights of the plaintiff bank within the meaning of this constitutional prohibition. He feels that any remedy that was adequate before §1083 was enacted, should be adequate after that section was changed.

He states that "there is no constitutional guaranty that a mortgagee shall always have the right to secure a judgment for the full amount in one action. We have seen that for many years prior to the enactment of §1083, a mortgagee was adequately protected by procedure which then allowed a separate action at law to collect a deficiency. The mortgagee still retains that right and in addition the right to recover a part or all of the deficiency in the foreclosure action."

Justice Lewis admits that the right to bring an action under §1078 is within the discretion of the court, but he says that does not alter the fact that the right and remedy exists. He gives no explanation, in justifying this holding, as to just how the plaintiff bank could persuade the court to exercise its power under §1078.

By my analysis of these statements, it seems that he argues that the common law remedy and the remedy provided by §1078 are the only remedies which could not be retroactively affected by the Legislature, that any extension of the old §1083, this common law remedy, is a mere additional remedy, granted gratuitously by the Legislature which they can, therefore, modify at will. It seems to me that he disregards that all-important question, - can the plaintiff bank recover its money?

Let us examine the facts of this case and see whether the plaintiff bank can recover the full amount of the loan, if the statute were applied retroactively. The amount due it on the debt was $18,000. Since real property values are down, the property could realize but $4,000 on a forced sale. The appraisal value of the premises was $11,000. The plaintiff bank under the new §1083 would be forced to credit the mortgagor, on its motion for a deficiency judgment, the market value of the premises rather than the actual sale price.

On the other hand if he did not move for a deficiency judgment, "the proceeds of the sale regardless of the amount shall be deemed in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Just where does the plaintiff bank's remedy lie? How can it collect that difference between the actual sale price and the market value of the land? The dissenting judge does not answer that question. It is difficult to see just how §1078 provides a remedy. As has been said and admitted by the dissenting judge, this right to sue has been limited to a right within the discretion of the court. What reason could the plaintiff show the court in order to obtain its sanction of the second suit? This is the fault the majority of the court finds with the remedy.

There is a clearer reason which shows that the plaintiff has no adequate remedy if this statute is applied retroactively. The majority opinion does not deal with it except to say that it assumes that the amendment does not supersede §1078. It was not necessary for the court to decide this question, in view of its holding. It seems to me, however, that the statute by its express terms takes away any other remedy. This would take away even the restricted right under §1078.

However, assuming, as the majority of the Court did, that an action will lie under §1078, the point should be well taken that such a remedy is limited and restricted. Such a remedy, as a practical matter, as far as the plaintiff is concerned, is non-existent. It seems clear, therefore, that the Court of Appeals justly determined that this amendment, if applied retroactively, would change the medium of the payment of the debt which was agreed upon by the parties from currency to land, insofar as there was a difference between the actual sale price and the market value of the property. It, thereby, impaired the obligation of the plaintiff's contract within the meaning of the constitutional prohibition.

DUNTON FORT TYNAN

APEX HOSIERY CO. v. LEADER AND AMERICAN FEDERATION OF FULL-FASHIONED HOSIERY WORKERS

[Philadelphia, Branch No. 1, Local No. 706]
310 U. S. 469, 84 L. Ed. 913

Are sit-down strikes conducted locally, but interfering with interstate commerce, within the Sherman Act? This question was considered in the Apex case and answered negatively. At this time it would not be amiss to review that case and some of the decisions therein cited. The case was decided May 27, 1940.

The facts in the case are as follows: The Apex Company employs at its Philadelphia factory about 2,500 persons in the manufacture of hosiery, and manufactures annually merchandise annually merchandise of the value of about $5,000,000. Its principal raw materials are silk and cotton, which are shipped to it from points outside the State. It ships interstate more than 80% of its finished product, and in the last eight months of 1937 it shipped in all 274,791 dozen pairs of stockings. In April, 1937, it was operating a non-union shop. A demand of defendant Federation at that time for a closed shop agreement came to nothing. On May 4, 1937, when only eight of plaintiff's employees were members of the Federation, it ordered a strike. Shortly after midday on May 6, 1937, when plaintiff's factory was shut down, members of the union, employed by other factories in Philadelphia who had stopped work, gathered at plaintiff's plant. Defendant Leader, president of the Federation, then made a further demand for a closed shop agreement. When this was refused, Leader declared a "sit-down strike." Immediately, acts of violence against plaintiff's plant and the employees in charge of it were committed by the assembled mob. It forcibly seized the plant, whereupon, under union leadership, its members were organized to maintain themselves as sit-down strikers in possession of the plant, and it remained in possession until June 23, 1937, when the strikers were forcibly ejected pursuant to an injunction ordered by the Court. During the occupation, machinery and other property was wrecked so that plaintiff could not resume even partial manufacture until August 19, 1937.

When the plant was seized there were on hand 130,000 dozen pairs of finished hosiery, of a value of about $800,000, ready for shipment on unfilled orders, 80% of which were to be shipped to points outside the State. Shipment was prevented by the occupation of the factory by the strikers. Three times in the course of the strike, defendants refused requests made by plaintiff to be allowed to remove the merchandise for the purpose of shipment in filling orders. The evidence is that the Company's representative thus besought the union's president: "We have orders on hand from customers all over the country which we can fill with merchandise which we have on hand at the plant. Will you permit us to go into the plant for the sole purpose of removing that finished merchandise so that we can ship it against the orders?" The union's president emphatically answered: "No, not until this strike is settled." Thus as the dissent say, "there was a direct and intentional prevention of interstate commerce in the furtherance of an illegal conspiracy."

Section 1 of the Sherman Act, 26 Stat. at L.209, Chap. 647, 15 U.S.C.A. §1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal." The Act further provides for triple damages in case of injury and this is the reason for plaintiff's bringing action under the Act. It would be well at this time to state a few general principles which are well settled and did not affect this decision. The acts of defendants did substantially restrict interstate commerce so as to bring the acts within the reach of the commerce power of Congress. Further, and this is important, in applying the Sherman Act it is the nature of the restraint and its effect on interstate commerce and not the amount of commerce which are the tests of violation. Also, there is no question that defendants intended to restrict shipments in interstate commerce. It is also settled that the Sherman Act does apply to labor unions. Lastly, the Clayton Amendment does not apply to this case.

The majority emphasized that the Act has never been applied as a means of policing interstate commerce. They also say that the restraint here has not been shown to have had any actual or intended effect on price or price competition. In conclusion they say, "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman Law, practically every strike in modern industry would be brought within the jurisdiction of the Federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it."

The minority speaking through Chief Justice Hughes found from a review of the cases that conspiracies obstructing or preventing transportation in interstate commerce were within the scope of the Act. Let us look at the cases involving labor disputes in which the Sherman Act has been applied.

United States v. Workingmen's Amalgamated Council (cc), 54 Fed. 994, 26 L.R.A. 158, 4 Inters. Com. Rep. 831 (1893): This was an action brought under the Act to restrain defendants from interfering with interstate and foreign commerce. The case involved the refusal of the warehousemen in New Orleans to submit to demands of the draymen. The defendant and other organizations in New Orleans called a strike which substantially tied up the movement of all goods in that city. The court held that such a general strike was within the Act. This case is cited by the dissent but is not considered by the majority. Although the court talks of transportation of goods in interstate commerce, I think the cases are distinguishable on their facts.

In re Debs, 158 U.S. 564, 39 L. Ed. 1092, 15 S. Ct. 900 (1895): Debs brought habeas corpus proceedings to relieve him from imprisonment for contempt in failing to obey an injunction restraining him from interfering with interstate transportation by train and especially those carrying mail. The Supreme Court did not consider the Sherman Act in reaching its decision. The lower

court had, however, based its jurisdiction on the Act. The Supreme Court carefully stated that it did not dissent from the lower court's application of the scope of the Act to embrace transportation of goods. Actually this case has little bearing on the outcome of the present decision although both opinions mention and discuss it.

Loewe v. Lawlor, 208 U.S. 274, 52 L.Ed. 488, 28 S.Ct. 301, 13 Ann. Cas. 815 (1908): This is one of the most famous applications of the Sherman Act to labor disputes. The plaintiffs were manufacturers of hats in Connecticut and sold them in some twenty states, They had many contracts waiting to be filled. Defendants were associated with the American Federation of Labor with members in all the States. The Federation demanded a union shop and put into effect a boycott upon plaintiff's customers until they agreed to demands of defendants. Action was taken under the Sherman Act to recover threefold damages. The Court held such acts to be within the scope of the Sherman Act. They said that the Act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business. The majority opinion in the Apex case held this to be an example of restraining competition to favor union shops. Thus under their "effect on price or price competition" theory this was a proper application of the Act. The dissenting opinion claims that the Loewe case is not to be restricted merely to boycotts but point to the citation in that case of decisions holding obstruction of shipments to be within the Act. I think that the holding in the Loewe case is more consistent with the interpretation of the dissent and should not, as the majority seem to do, be unduly restricted to cases discriminating between would-be purchasers. As Chief Justice Hughes says in his dissenting opinion in the Apex case, "****of what avail is it to interdict boycotts or to assure a free market, that is, to secure freedom in obtaining customers, and yet to leave unprotected the right to ship goods to the customers thus obtained?"

The same interpretation is placed on the holding in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 65 L.Ed. 349, 41 S.Ct. 172, 16 A.L.R. 196 (1921), by the majority. This was another case of secondary boycott or the use of coercion, threats and pressure by a national union to prevent the sale of machines in interstate commerce. The majority emphasize in distinguishing this case that the restraint operated to suppress competition in the market. I think the entire approach to the interpretation of these cases by the majority is inconsistent. They recognize that it is not the amount of commerce affected but the nature of the restraint which calls into operation the statute. Thus, it is the boycott, not the effect on competition which permits the application of the Sherman Act. Would not a boycott be illegal affecting but 2% of a particular article but having no appreciable effect on price? Otherwise one could not protect himself until a sufficient volume of his business had been destroyed so as to affect national price or competition. I think this is erroneous. Does it matter that only 130,000 dozen pairs of hosiery were prevented from entering the channels of interstate commerce? The court says no. Yet they continue to emphasize that there was no intent to effect competion or price. What if the strike had prevented 50% of a particular article from entering such interstate channels. Would this not appreciably have af-

fected the price? Would the strike then be within the Act? If so, is the court not making volume rather than the type of restraint the determining factor? I think the Act was meant to control particular types of restraint as well as to protect price or competition. A conspiracy or combination is illegal regardless of the volume of business it affects.

The next case, United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 64 L.Ed. 975, 42 S.Ct. 570, 27 A.L.R. 762 (1922), is one upon which the majority rely heavily. Of the coal mined at the Coronado mines, 75% moved in interstate commerce. A local branch of the national union called a strike preventing all mining of coal and interstate shipments. Action was brought under the Sherman Act to recover treble damages. The Supreme Court held coal mining to be a local industry and not interstate commerce. The court say, "If Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan to hinder, restrain or monopolize interstate commerce. But, in the latter case, the intent to injure, obstruct, or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances. If unlawful means had here been used by the national body to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the Anti-Trust Act." The court found this local strike not to be a part of any plan. My reaction to the case was that the court was carried away by the fact that the amount of coal mined was so small as to have no appreciable effect on the national market and that the acts of the company were such as to arouse local opposition, the area being inherently union. It is also interesting to note that the court did not find any intent to restrain commerce. Yet in the Apex case the court specifically finds such intent.

The Second Coronado Case, 268 U.S. 295, 69 L.Ed. 963, 45 S.Ct. 551, presented new evidence showing intent to obstruct interstate shipments and the judgment in favor of the local union was set aside. The court goes on to say that the purpose was to stop production of non-union coal and prevent its shipment to markets in other states, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines. Of course the majority leaped on this to show that restraint of competion was the big factor. I prefer the words of Chief Justice Hughes, speaking for the dissent in the Apex case: "But the interstate commerce that was thus found to be directly and intentionally obstructed was the shipment of the coal, and whether the purpose was to maintain unionization in other States, or within the same State, would not seem to be material, so long as the interstate commerce in either case is directly and intentionally prevented."

United Leather Workers International Union v. Herket & M.Trunk Co., 265 U.S. 457, 68 L.Ed. 1104, 44 S.Ct. 623, 33 A.L.R. 566 (1924): Complainant manufactured leather goods for sale in interstate commerce. A demand for a union shop was made and upon refusal a strike

was called. The facts found showed no attempt to prevent shipment or sale in interstate commerce. As Chief Justice Hughes says, in the Apex case, "***the dictum from the opinion in that case, which the Court quotes in its present opinion, must be read with what immediately follows where the Court pointed out that there was no direct interference by the defendants*** 'With the interstate transportation' of the goods of plaintiff company." This distinguishing factor is enough to destroy the case as authority for the majority.

The marjority also rely on the opinion in Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, (1927), 274 U.S. 37, 71 L.Ed. 916, 47 S.Ct. 522, 54 A.L.R. 791: Complainant quarried stone for sale in interstate commerce. The company was put on an unfair list and defendant's members were instructed not to work on any stone produced by them. This was held to be a restraint of trade. The strikes were held to be directed against the use of the product in other States, with the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce. Applying this negatively the majority in the Apex case found a distinction. Cf. Levering & G.Co. v. Morrin, 289 U.S. 103, 77 L.Ed. 1062, 53 S.Ct. 549, holding similar acts permissible where there was no showing of a direct or intentional restraint of interstate commerce.

I find the decision in the Apex case to be inconsistent with previous decisions and with the current attitude of the court toward interstate commerce. Again quoting Mr. Chief Justice Hughes in his dissenting opinion, "It would indeed be anomalous if, while employers are bound by the Labor Act because their unfair labor practice may lead to conduct which would prevent the shipment of their goods in interstate commerce, at the same time the direct and intentional obstruction or prevention of such shipments by the employees were not deemed to be a restraint of interstate commerce under the broad terms of the Sherman Act."

I can find no justification for the view of the majority that such an application of the Act would bring practically every strike within Federal jurisdiction. If the Act is so written that such is its natural and logical interpretation the court should so apply it. Judicial interpretation should never venture into the field of legislative amendment. I do not think the Act was intended nor do the cases seem to rest on the distinction that it applies only to those restraints monopolizing supply, control of price or market or discrimination between would-be purchasers. I think an intentional direct restraint of interstate commerce is within the scope of the Act.

JOHN WALTER BRITTEN

CALLING ALL DISTRICT ATTORNEYS

In a recent case, People ex rel. Coyle v. Truesdell, 259 App. Div. 282, decided April 8, 1940, Appellate Division, 2nd Department, added another chapter to the already voluminous, yet confusing story of self-incrimination. The court held that defendants were immune from prosecution.

Here is a brief résume of the facts: The defendants were charged with the crime of conspiracy, in that they unlawfully conspired with each other, with one Klapkin and one Hambridge, and with divers other persons, to bribe one John Sloan, a public officer. It is alleged that each defendant during the period involved was engaged in the retail grocery store business in the City of Newburgh, that each was selected by Sloan to supply foodstuffs and other commodities to those on relief - the actual conspiracy consisting of an agreement by each defendant to give Sloan 5% of the income received from such orders, for the purpose of influencing the placing with them of such orders.

Prior to the return of the indictment, the defendants were subpoenaed to appear before the grand jury, were then sworn and testified to a limited extent. Consequently in this writ of habeus corpus action the defendants urge that they are entitled to immunity from prosecution of crime about which they have testified. The defendants rely heavily on §584 of the Penal Law providing as follows: "No person shall be excused from attending and testifying or producing any books, papers or other documents before any court, magistrate, or referee, or before any joint legislative committee, upon any investigation, proceeding or trial for or relating to or concerned with a violation of any of the provisions of this article (Penal Law) upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter or thing concerning which he may so testify or produce evidence documentary or otherwise and no testimony so given or produced shall be received against him upon any criminal investi gation, proceeding or trial." In short, the defendants claim that because they testified before the grand jury during the consideration of the indictment for the same crime, they are immune from prosecution for that crime. The defendants also claim, and it is conceded by the People, that they did not sign a waiver of immunity pursuant to the provision of §2446 of the Penal Law.

The question of self-incrimination is covered by a blanket provision in the State Constitution, to the effect that no person shall "be compelled in any criminal case to be a witness against himself." Section 584 of Penal Law was added in 1931. The latter section, applied in the light of an individual's constitutional right against self-incrimination has given rise to an entirely different collection of principles of law from those resulting when the constitutional provision alone was in question.

Let's take a look at the leading cases in New York on self-incrimination to obtain a more lucid picture of the problem; also

to analyze the authority which influenced the court in reaching the decision.

One of the most important cases is People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253. In that case, Lewisohn was subpoenaed by the District Attorney who was presenting information to a magistrate looking forward to an indictment of one Canfield on a charge of conducting a gambling-house. Lewisohn was sworn in, and after admitting that he had known Canfield for four or five years, the following question was posed to him by the District Attorney: "Have you ever been in the premises, No. 5 East 44th Street, in the City of New York?" (the premises charged as a gambling house). Lewisohn refused to answer on the ground that his answer might tend to incriminate him, whereupon the District Attorney invoked §342 of the Penal Code (§342 forbade only the use of his testimony but did not forbid prosecution), which purports to compel a witness to testify. Lewisohn maintained a stubborn silence. The District Attorney, a little on the stubborn side also, incarcerated Mr. Lewisohn for criminal contempt of court. Feeling very much oppressed, the defendant fell back upon that ancient right of free men, the writ of habeus corpus. Thus the question was put squarely before the Court of Appeals. The Court held unanimously that the relator could not be compelled to testify; that the statute was not co-extensive with the constitutional immunity since it does not prevent the use of evidence against him which may be obtained through his testimony, but simply excludes his testimony.

At first glance the natural reaction might be that the Court was stretching the self-incrimination doctrine to a point well beyond the zenith of its elasticity. This school of thought argues that Lewisohn couldn't incriminate himself by answering "yes"; that admitting being in a gambling "joint" in no way tended to incriminate the witness; that the court should have compelled the witness to answer as they have the power where it is absolutely certain that the witness is in no possible danger of disclosing facts which would leand to his indictment and conviction or where it is obvious that the witness is fraudulently shielding a third person.

However, the Court asserted that a witness' fundamental constitutional right against self-incrimination cannot be altered except by a co-extensive statute by the Legislature, i.e., a statute which, though altering the procedure affords as complete an immunity as the Constitution. The Court held that §324 was not such a provision since it would be satisfied if the witness' testimony only were excluded, thus leaving the door wide open for the District Attorney to use the evidence obtained as a result of the witness' direct admissions under oath.

Bartlett, J., writing the opinion of the court, stated: "It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact, of itself, might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but

draw it from thence and he is exposed to a prosecution." The court went on to say: "It is quite impossible for the court to say to what extent the witness, if he answered, would be incriminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him, if given herein."

In the Matter of Solvei, 280 App. Div. 117, the respondent, an attorney, was cited before the Appellate Division, 2d Department in a disciplinary proceeding charged with unethical practice in refusing to waive immunity and testify before the grand jury considering an indictment of respondent and others for crime of conspiracy to obstruct justice. The court held that this fact could not be used against respondent since under provisions of §584 he could have been compelled to testify whether or not he was willing. By way of dicta, the court also asserted that though the respondent could not be prosecuted, any testimony given by him indicating a wrong could be used in a disbarment proceeding since such proceeding is not a penalty or forfeiture within the meaning of §584.

In the matter of Seymour v. Larkin, 254 App. Div. 215, the court held that Seymour was guilty of criminal contempt of court for his refusal to answer certain questions propounded by the District Attorney in a criminal trial of a public officer accused of accepting bribes, since the statute compelling such testimony afforded complete immunity.

In People v. Reiss, 255 App. Div. 509, the defendant was called to testify before a grand jury investigating an alleged conspiracy in an electrical contracting industry. The witness was informed that if he testified truthfully and his testimony disclosed a crime he couldn't be prosecuted for that crime. The witness testified and now is being tried for perjury in connection with such testimony. The defendant asserted the immunity provided in §584 against the use of testimony against him. The court held that the People were forbidden by §584 from using testimony to prove past criminal offences but not from using the testimony, if false, to establish the crime of perjury.

In People v. Kramer, 257 App. Div. 598, the defendant was called before a grand jury investigating the collection of "hush" money from a gambling mob to secure freedom from police interference. When called in April, the witness testified generally that he was not connected with the matters in question. When called later, in June, before the same grand jury, the defendant refused to answer specific questions on the ground that he would have to repeat the previous testimony, thus tending to incriminate himself in respect to the crime of perjury for his first testimony. The court held that repetition would not have a criminatory effect, since the testimony related to personal transactions. The answers, being necessarily wilful and deliberate, repetition would not tend to establish that the former testimony was or was not deliberate.

After citing these cases the court said: "Recognizing these principles of law the question in these cases resolves itself into a determination as to whether or not these appellants (Coyle, etc.) gave testimony which might be utilized in obtaining their conviction under the indictments. To afford immunity it is not necessary that testimony should amount to an admission of guilt. It is sufficient if it might constitute a link in the chain of evidence against them."

In the present case, prior to testifying before the grand jury, each appellant voluntarily made a statement to the prosecuting officers at headquarters tending to implicate themselves in the unlawful payments to Sloan. These statements were before the grand jury. Before the grand jury, Coyle was asked to describe the circumstances at the time the statement was made to the District Attorney. Whereupon he testified that he made the statement voluntarily after a full disclosure of his constitutional rights by the prosecuting officers. In discharging Coyle, the court said: "This testimony confirmed the fact that he made the statement implicating himself in the crime with which he is now charged, and was to the effect that he had made it freely." * This was testimony which could be used against him if the claim developed on the trial that the statement was unlawfully procured and if he attempted to avoid and nullify the effect of it."

The other appellant, Massie, after giving his address was asked if that address, 101 Liberty Street, was his store or his residence. He testified, "Residence and store both"; thus it was established that he maintained a grocery store at 101 Liberty Street. In discharging Massie the court said: "It is quite conceivable, in the light of the nature of the charge, that witnesses would be called to testify that directions were given to them, attributable to Sloan, to go to this store to secure commodities." The court felt that by admitting ownership of the store, Massie might very well have supplied a link in the chain of proof against himself. Thus even this meager amount of testimony was sufficient to allow the appellants to be immune forever from prosecution for the crime charged.

To the casual reader this decision might seem to guarantee participants in conspiracies absolute immunity if they will only make even the slightest admission before the grand jury. However, a better viewpoint would be that the court is warning all prosecuting attorneys not to abuse the advantage given them by these immunity statutes by forcing those accused, rather than the grand jury, to return the indictment.

JAMES JOSEPH BYRNE

N O T E S

PEOPLE V. YANNUCCI, 283 N. Y. 546, 258 App. Div. 171 (July, 1940).- This is one of the most interesting of recent criminal cases. To the law student it is a startling example of how a legal technicality came dangerously close to freeing obvious criminals.

The six defendants were accused of raping complainant under the following circumstances: Complainant was an Englishwoman, 25 years old, who had been in America for two months, and was working in a laboratory on Long Island. She was seated in a railway station about three o'clock one morning when Yannucci, whom she did not know, approached her and invited her to go to a nearby restaurant for a cup of coffee. Yannucci had one arm in a sling. Complainant accepted and they walked to the restaurant. In front of it, Yannucci told her the place was closing, and then led her to a parking lot in the rear, where there was a shack, telling her they could gain admittance by the rear door. Yannucci, who was a prize fighter, then attacked the complainant. She defended herself, and they two were struggling when three of the other defendants appeared and said that they were policement and would carry complainant off if she resisted further. The other defendants then appeared and all participated in the attack. Five of the defendants had previous criminal records.

The defense interposed was that the complainant consented to the attack upon her, or at least did not resist as vigorously as she might have done. The Appellate Division, with remarkable naivete for so learned a body, arrived at the following conclusions

(1) While the defendants are unworthy, the law is to be applied alike to the worthy and the unworthy. This would seem to mean that while five of the defendants are admitted criminals, and Yannucci had a previous conviction for sodomy, their word would overcome complainant's by sheer force of numbers.

(2) That "complainant was not inexperienced. She left a place of safety on the invitation of one of the defendants whose arm was in a sling." The connection between complainant's experience and Yannucci's broken arm is known only to the court.

(3) That complainant welcomed defendant's conduct. In view of the testimony, we must assume that the court takes judicial notice of the fact that when a woman says "No" she means "Yes."

(4) That as a result of these conclusions there was no corroboration of complainant's testimony. This despite the fact that immediately after the attack, she went to the railway station and disclosed the crime to the ticket agent, and medical testimony indicated that she was so near collapse that a physical examination was impossible until a day later.

Fortunately, the Court of Appeals would not accept this sad picture of a cold-blooded woman railroading six innocent men to prison. The Court reversed the decision of the Appellate Division

and affirmed that of the Queens County Court. The Court notes that under §543-a of the Code of Criminal Procedure, the Appellate Division must state whether reversal is based on law or fact or both, and in the event reversal is on the law only (as was the case here) it will be presumed that for the purposes of appeal to the highest State court, the Appellate Division reviewed the facts and was satisfied with the conviction in that respect.

The facts as stated, then, were assumed to be true. Since the indictment alleged that complainant's resistance "was prevented by fear of immediate and great bodily harm, which she had reasonable cause to believe would be inflicted upon her", the defendants could not debate that question on appeal.

The Appellate Division reversed because of the People's failure to establish corroboration, having accepted the defendants' assertion that there was none as to the fact that complainant's resistance was prevented by reasonable fear of immediate bodily harm. The Court of Appeals held that the only way to establish corroboration in a rape case is in the light of surrounding circumstances; that the circumstances indicated that complainant was in fear, and that this was corroborated by the admissions of defendants, the fact that complainant was confronted in a lonely spot by six men, there being a remote likelihood of any help arriving; by the physician's testimony as to her physical condition; and by complainant's prompt disclosure of the crime. The judgment of conviction was affirmed.

G. N. N.

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MATTER OF COMMISSIONER OF TAXATION AND FINANCE (HOLBLOCK) v. RIGER BUILDING CORPORATION.- This case, decided in September of this year appears in 260 App. Div. 358. In October, 1935, the Montell Construction Company employed one George Holblock as a laborer. The Montell Company was a sub-contractor for the Riger Building Corporation. On the above date, Holblock sustained injuries in the regular course of his employment which resulted in his death. He left no survivor entitled to compensation under the Workmen's Compensation Act.

The sub-contractor had no compensation covering its employees, although the principal contractor did carry such compensation with the Travelers Insurance Company. Both the contractor and the insurance company appeal from an award of the State Industrial Board, in the amount of $1,300, made against both corporations and the insurance carrier.

Three sections of the Workmen's Compensation Act are pertinent to the case in question. Under §56, a contractor employing a subcontractor is liable for "and shall pay to any employee" the insurance, in cases where the subcontractor failed to take out insurance himself. The contractor may then recover over against the

subcontractor. Other sections provide that an award made in the case of an employee who leaves no survivors entitled to compensation, shall be distributed pro rata among certain special funds, the purpose being to provide additional compensation for other employees throughout the State. The $1,300 award was so distributed in this case.

The principal contractor and insurance carrier assert they are are not liable because deceased was not an employee of the Riger Corporation, but of the sub-contractor. The Appellate Division held that while the statute says the contractor must pay "to any employee", a liberal construction indicates the Legislature meant payments were to be made in the alternative to the State Fund, if the employees in question left no dependents entitled to Compensation. Any other construction would make appellants liable if the employee were only injured, since they would have to pay him, but if he were killed there would be no liability. The award of the State Industrial Board was affirmed.

G. N. N.

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PEOPLE v. STRAUSS.- An interesting, but not startling, application of the self-incrimination rule was proposed recently in County Court, Kings County, during the trial of Harry Strauss, a principal in the notorious Murder Inc. It appears that the defendant, while he was incarcerated awaiting trial, allowed his hair to go untrimmed and refused to have his face shaved. The District Attorney moved for an order requiring that the defendant be forcibly shaven and have the hair on his scalp forcibly trimmed. In support of this motion, he contended that the defendant's purpose was a dual one - first, to assume the wild appearance of manic psychosis; second, to make identification difficult, maybe impossible. The deferdant contended that his constitutional rights would be invaded by the proposed order, and that such order would go further than legitimate court functions permit.

Judge Taylor, in a concise opinion, found in 174 Misc. 881, deals very briefly with the defense based upon the constitutional protection against self-incrimination, in these few words: "The constitutional safeguard against compelling a defendant in a criminal proceeding to be a witness against himself does not apply. That refers to testimonial compulsion, as a 'witness', at a court hearing or trial, and the word 'witness' is the key-word." Here the court cited authorities in which the following were included:

In People v. Gardner, 144 N.Y. 119, the defendant was being tried for an attempt to commit the crime of extortion. For the purpose of identifying the defendant as the individual in the company of the prosecutrix upon an occasion having a material bearing on the case, the prosecutrix called a witness who testified that he did not know the defendant, but would know him if he saw him. The court then compelled the defendant, over the objections of his counsel, to stand up for identification. It was held that this

did not come within the constitutional protection as the main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. The court went on to say that "a murderer may be forcibly taken before his dying victim for identification, a thief may be forcibly examined and the stolen property may be taken from his person, a prisoner may be examined for marks or bruises and then they may be proved upon his trial to establish his guilt."

In People v. Van Wormer, 175 N.Y. 188, three defendants were indicted for murder. After their arrest, their shoes were taken from them forcibly and placed in footmarks leading to the house of the deceased made in the newly-fallen snow on the night of the murder. The shoes corresponded in all respects to the footprints. Evidence of this fact was held admissible on the trial.

In Ross v. Indiana, 204 Ind. 281, 182 N.E. 865, the defendant was being held for bank robbery. He was held until he had grown a beard of approximately the same length as the robber's at the time of the crime and was then presented, with a handkerchief covering the most of his face, to the assistant cashier for identification. The court held that the rule against self-incrimination does not apply to pre-trial efforts to identify a suspect and that the assistant cashier could testify on the trial as to the result of her observation. It would seem to follow that direct evidence by means of the defendant himself, shaved or unshaven according to his condition at the time of the crime, would be proper.

In Holt v. U.S., 218 U.S. 245, the defendant objected to testimony by a witness that the defendant had put on a sweater or blouse and that it had fitted him, on the ground that he was thus forced to be a witness against himself. The court characterized the defense as an "extravagant extension of the Amendment."

In O'Brien v. State, 125 Ind. 38, 25 N. E. 137, the defendant was held for murder and some witnesses were asked to examine him in the jail to determine his true identity by certain marks and scars. There was no consent and the prisoner was handcuffed so that he might be examined by force. Testimony on the trial as to the marks and scars was upheld.

Wigmore, in his work on Evidence (3d ed. §§2263, 2265) states that the common conception of the constitutional provision is that it is to "prohibit the employment of legal process to extract from a person's own lips an admission of his guilt to take the place of other evidence." "It exists mainly to stimulate the prosecution to a full and fair search for all the evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law." He asserts that to stretch the protection beyond this point would, reductio ad absurdum, allow a criminal to shut himself up in his house with all the "tools and indicia" of his crime, safe from all prosecution for his wrongdoing.

I think no one will question the wisdom and policy of this recent holding although some may be surprised that a court has the power to compel the defendant to cut his hair and shave included among its discretionary powers. The court also said that the proposed act is "simply supported by analogy. The trial court may direct where the defendant shall sit, in what direction he shall face, and to stand up for the purpose of identification. Also, it may strip him of any artificial covering or disguise, and may compel him to submit to compulsory disrobing for the purpose of revealing bodily marks or characteristics which may aid in identification." That this is a natural disguise is no defence. Sound policy is the basis for this decision.

Perhaps the court was influenced by the atrocities allegedly committed by Murder Inc., but I think that it must be generally admitted that such a restriction of the self-incrimination rule will in no way work to the disadvantage of the innocent, while it prevents the creation of a multitude of loopholes through which clerver criminals may evade their just punishment and go free to prey on the public. An opposite application of this constitutional protection would greatly embarrass the administration of justice.

R. F. S.

BOOK REVIEW

WOE UNTO YOU, LAWYERS!
[New York, 1939]

We have a traitor in our midst. Mr. Fred Rodell, a member of the faculty at Yale Law School, has written "Woe Unto You, Lawyers!" and advanced the theory that lawyers are a group of medicine men engaged in fooling the public.

Mr. Rodell seems a little surprised at his own temerity in teaching law when he has so little faith in the way it is practiced in the United States. He finally confesses that he is engaged in a one-man crusade to prove to law students that the Law, including its concepts and principles and medicine men, is really pretty silly.

There is a lot to be said for Mr. Rodell's criticism. It takes a first-year law student about a week to learn that there are certain things about the law - its language in particular - which are a little outmoded, but the bitterness with which Mr. Rodell attacks our legal institutions seems hardly justifiable.

It is difficult to see just what the author proposes in place of the present situation. Any attempt to argue with him is difficult, inasmuch as he anticipates most of the arguments and dismisses them with the statement that they are only the attempts of a lawyer to be loyal and protect his profession from an exposé which would throw most of the profession onto the street, penniless. The only answer to that, as far as we are concerned, is that an argument may still be valid no matter what the motives of the person who is arguing may be. Having thus excused ourselves, we should like to try to answer Mr. Rodell.

"It is the lawyers who run our civilization for us - our governments, our business, our private lives." Conceding the truth of this, it is still true that any society, if it is to survive, must have some set of rules and regulations; in a world as complex as ours, it is inevitable that someone specialize in knowing the rules, interpreting them, and enforcing them. You don't go to an automobile mechanic when you want a broken leg set; you go to someone who knows his job - a doctor. The general public certainly cannot all be expert in the law. Our use of the word "interpret" above would doubtless annoy Mr. Rodell, as he thinks that if laws were wrtten right, and if the courts were not a collection of stuffy and pompous old men, the laws wouldn't need interpreting. This is of course the fault of the lawyers, who are in the great majority in most of our legislatures. But they had to be elected to be there, Mr. Rodell, and as yet they seem to be the ones who take an active interest in our Government and its workings. It seems to boil down to the fact that our legal system isn't perfect. What social institution is?

The next target of Mr. Rodell's wrath (and wit) is legal phraseology. We can't take issue with him very strongly on that score. It is true that when an attorney says "consideration" he doesn't mean kindness, but if Mr. Rodell has ever listened to a

doctor trying to explain to a patient that he is suffering from a sore throat, he must know that technical words are the tool of every profession. It seems easier to say "consideration" than "the money paid by the plaintiff for the goods."

"The Law, alone of all the sciences, just sits - aloof and practically motionless." Even if this were accurate, we don't think anyone could make it move faster. The law deals with the behavior of people, and we don't change our ways of living very rapidly. In a society where there are many women and few men, it might be desirable to practice polygamy, but our instinctive dislike of the idea would make the change a slow one. And so it is with the law; a catastrophe like the present war makes conscription a wise idea, but the mere passage of a law won't cause a hundred and thirty million people to enjoy the loss of their individual liberties. Laws, after all, are made by the people, and can progress only as fast as the people do.

Another objection of Mr. Rodell's is that one man's opinion can determine what the law is to be. This, again, is a situation which could not possibly be changed. Under our present system, at least several judges can pass on a point of law, and often the decisions are close. The only alternative is to have one judge decide, and that is the very "evil" which the author wants removed!

Nor is the law practical. It deals with abstractions, never comes down to earth, and if it ever really knows what is going on, it doesn't talk that way, but lives in the past. This is an extension of the author's theory that legal concepts change too slowly. To take a specific example of our own, Mr. Rodell: The law has said for a great many years that a man should not be able to enforce an agreement if he gave nothing for the promise or money he seeks to obtain. We don't think you can find any objection to the justice of that principle, yet it applies equally to the peasant a few centures ago who wanted his ox-cart returned, and to the railroad corporation today who wants its million dollar contract enforced. Because the principle is often expressed in language which may have been in use in the early days of the common law, it does not necessarily follow that the principle is not workable. No matter how lucrative a "racket" the legal profession may have (and there are those who will argue with the author on that point, too), the fact remains that mankind is usually interested in expediency (another way of saying that he is instinctively lazy). If we knew of a more workable rule to use in dealing with business affairs, the chances are we would use it. And this isn't true of the example we have chosen only; it applies equally to the entire field of the law. If we seem slow in grasping new ideas, don't blame the Law for it, Mr. Rodell.

In one chapter, entitled "No Tax on Max", the author has some fun in quoting an opinion of the United States Supreme Court, and then reducing it to the language of the man in the street. The translation -if that is the proper word- is cleverly done, but the author apparently forgot that portion of his legal training which told him that reductio ad absurdum is one of the worst forms of argument. Be that as it may, we do not believe anything would

be gained by changing the phrase "The suggestion that the record discloses no federal question is without merit" to "The idea that this might not be any business of ours at all is beneath serious consideration." The opinions of courts are printed for lawyers, and while a layman may not know what a trust certificate or a chose in action is, that is no reason for requiring the court to devote a few pages to an explanation. A medical text or an engineering manual doesn't waste time in explaining compound fractures or links and chains. An expert in any field is justified in assuming that his readers will at least be familiar with the words he uses.

Mr. Rodell is angry because the law has no continuity or certainty, although it professes to have. This confused us, inasmuch as the continuity he desires is well evidenced by the survival of the numerous "obsolete" principles he wishes to do away with. What he meant, we think, was that it is all right to have principles survive if you agree with them. The only reply to that is the one we have already made; if enough people disliked them they wouldn't be there. And if the great deluded public, with whom the author is so sympathetic, is so indifferent they won't act to change the rules, they certainly are the last to complain. Mr. Rodell doesn't mention that one one is more aware of the law's failings than a lawyer. His proposition that the legal profession is engaged in a conspiracy, deliberate and malicious, to fool the public is, in the words of the august body mentioned previously "without merit."

As to the law's lack of certainty, it should be apparent that with changing conditions, the law should change also. A few pages ago Mr. Rodell was bemoaning the fact that the law wasn't modern and didn't change fast enough. The possibility of a thing changing and still being certain is so remote that Mr. Rodell's speculations seem a waste of time.

"The Law is bought" says Mr. Rodell, "by hiring the services and the advice of the smartest lawyers - who are most adept at manipulating the principles of what the Law is made." There is something dishonest and unfair, Mr. Rodell feels, in the fact that the poor farmer can't hire a Clarence Darrow to present his case to the court. The great surgeon who charges several thousand dollars for an operation is not dishonest, nor is the big-name architect, nor the gifted violinist. Only the lawyer.

The author's theory is, apparently, that a lawyer possessing a particular talent convinces the court and the jury more easily and hence the opposite party isn't receiving true justice. This is incontestable, as far as the jury is concerned, but given a particular set of facts and a competent judge, our system comes as close to fairness as any. In his final chapter Mr. Rodell suggests that the lawyers be thrown out bag and baggage and a "practical set of comprehensible rules" put in their place. He admits that consistency and certainty are impossible in man's affairs and says the law's mistake is in trying to attain those qualities. This is all well and good, but the practical and comprehensible rules would still have to be administered by men who know them. No amount of public education would teach the man on the street that

Page 42 is missing. It is due to mis-numbering of pages, as copy is continuous.

it is unjust to let a witness testify as to what he heard John Jones tell Pete Smith about the way the accident happened. Mr. Rodell probably would not contest this, but would insist that the modern medicine men shouldn't call the testimony "hearsay", because the layman doesn't know what it means.

The author feels that each case should be settled purely from the standpoint of fairness, and that laymen, having as good a sense of justice as the lawyer or judge, would be competent to decide what was fair. It is our belief, however, that the "mummery" Mr. Rodell so dislikes is in reality a set of rules that has grown up dealing with what some of the best minds of each generation have considered fairness. Because the rules are expressed in terms that are obscure to the layman, it does not follow that the legal racketeers are taking the public's money and giving them nothing in return.

It is suggested that professional men should act as judges in cases where their professional knowledge would be of value, and this is without doubt an excellent idea. But while a psyciatrist could apply his technical knowledge to good advantage in a case where the sanity of a defendant is in issue, he still knows nothing about the competency of evidence. If we turn the trial over to someone who has that knowledge, and let the psychiatrist testify as to what he thinks of the defendant's sanity, we have the system in use at the present time. The author is willing to grant that certain laws would have to be written in books, after they had been "simplified", and believes that if they were then available to everyone, everyone could plead his own case without legal assistance. But we have a feeling that people would still turn to a person who dealt with those laws every day. The Caspar Milquetoast who would drop dead at the thought of presenting his own case in court would hardly receive the justice Mr. Rodell seeks.

In the last analysis, the fact remains that while our legal system certainly has a number of weaknesses, it has survived not because people accepted it from habit, but because the other systems with which mankind has experimented have not worked out very well. A criticism of our present legal structure is certainly justifiable; a suggestion that it be completely discarded so that the public will have its eyes opened to an evil which doesn't exist is no more logical than abandoning the democratic form of government because it is not so efficient as a dictatorship.

GROVER NELSON NORTH

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JUDICIAL REVIEW BY THE WALTER-LOGAN BILL

Of great interest to lawyers and laymen alike is the recent Walter-Logan Bill which finally passed Congress only to be vetoed by the President. This interest is founded upon a justified apprehension over the mushroom growth in number and power of administrative agencies. The time has come, and not too soon, when John Public has begun to view with some skepticism the antics of the Administration and to question the unprecedented measures touted as necessary for "expediency" under the various "emergencies" of the past decade. These terms are becoming hackneyed and are losing their ability to camouflage the real issues.

Never before has there been such a radical departure from the fundamental principles of our Constitution, especially the theory of separation of powers, upon which history has shown that liberty, due process, and democracy itself depend! The Walter-Logan bill is indicative of some recognition that the proper precautions have been omitted in the anxiety to meet the requirements of a new and decidedly more complex civilization.

Limitations of this article prevent consideration of the Bill in all of its many aspects, and so, with the exception of general references by way of explanation, discussion will be restricted to the phase of judicial review of decisions or orders of the administrative boards.

The Bill owes its origin to the American Bar Association, through the work of its Special Committee on Administrative Law which was created in 1932 for the express purpose of investigating this field of the workings of the new Government.

The problem faced by the present governmental reformer is a very difficult one. There is a host of agencies with varying degrees of power - none slight - exercising quasi-lagislative and quasi-judicial functions. These agencies formulate a staggering number of rules and regulations having the full force and effect of law. Members of these agencies then hear the grievances of individuals affected and decide their rights, from which decision the individual has no adequate opportunity to obtain judicial review.

The Walter-Logan Bill would have at least one intra-agency board in every agency, consisting of three of its employees. These persons are to be appointed by the head of the agency, and at least one member must be a lawyer, who acts as chairman of the board. When not engaged in hearing administrative appeals, the members of the board resume their duties in the agency. Section 4a also provides that "No member of a board who has participated in a particular case or in the preparation, draft, or approval of any rule shall sit in review or appeal of the case or application of the rule."

Section 4b sets up the procedure of contesting an administrative rule or regulation. It provides by various requirements for a speedy disposal of the issues. But, contrary to the popular governmental notion that important sacrifices must be made for speed and efficiency, the Bill specifically insists on all practical safeguards which tend to insure justice. The chairman of each board has the power of subpoena to compel the attendance of witnesses and the production of documents; there are adequate provisions for notice; all testimony and evidence adduced at the hearing must be taken down and transcribed into a written record; and the finding of facts and decision of the board are included in this record, as is any act of the head of the agency either in approval, disapproval, or modification of the finding of facts or decision.

It might be well to add at this point, in anticipation of the attack that such procedures before the boards will greatly impair the rapidity and smoothness of administrative action, that such a hearing is not mandatory. The individual is entirely at liberty to carry on informal negotiations with the officials of the agency and a hearing is held only upon his election. The very presence of this remedy does not mean that it will be put to use in every case, but it is believed that its presence will operate to elicit more care by the agency in its acts, and that it is of vital importance as a guarantee of due process.

The establishment of the three-man boards in agency seems arbitrary at first glance. The purpose is to create a board of sufficient members to protect the individual against the bias or prejudice of one judge and to further the uniformity sought by the Bill as a whole. It will be noticed that there is no provision against setting up more than one board in a single agency where the volume of cases makes this "necessary and desirable."

The desire to maintain a workable degree of flexibility in these boards manifests itself in the provision that "When the members of the board are not engaged in the hearing of administrative appeals as hereinafter provided, such employees shall be assigned to other duties in the service of the agency concerned." (§4a). The possibility of an ever-changing personnel of the boards would tend to eliminate the inefficient members and to prevent the introduction of political pressure upon the appointment of any particular persons. It was hoped that constant touch with the practical workings of the agency would preserve the knowledge and understanding necessary for a wise decision in highly specialized fields, besides making the probability of the erection of controlling rules and precedent by a stagnant board infinitely less. That a man should not act as judge upon a case which he investigated or which contests a rule which he helped to formulate would seem obvious, but since it has been held to be proper, (Reimer v. The Freeholders of Essex, 96 N.J.L. 371, aff'd 97 N.J.L. 575) it must consequently be included.

Because of the haste in establishing many of the agencies of

the Administration, there are those which have boards appointed by the head of the agency as agents clothed with that portion of his authority. Some are one-man boards; others, formulated by necessity and, lacking special statutory authority, more or less informally, were organized in a manner designed to effect one end - expediency. Such boards often do not have any means of compelling the production of important evidence and rely to a great extent on ex parte reports. While the majority of such reports may be, and undoubtedly are, correct statements of fact, that is of little consolation to the person whose case is inaccurately reported. If such a report is the basis of a finding by a higher authority, justice will not be done in this particular instance.

Section 4b, in an attempt to formularize the procedure before an administrative board, corrects these defects by requiring all the safeguards of a regular court trial. These have been referred to above. Most important of these are the power of the chairman to compel the attendance of witnesses and the production of documents by subpoena, and the requirement that all evidence, findings of fact, decision of the board, etc., be included in the written record. This would eliminate ex parte reports and completely abolish "the practice of first deciding a case and then having the statement of the findings of fact and reasons for decision prepared by its own attorneys who must later defend the decision in event of an appeal to the courts. Findings are frequently drafted with reference to, and even embodying the actual phraseology of, the statutory requirements, and with specific regard to the evidence adduced at the hearing." (Report of the Special Committee on Administrative Law, 1933, p.206 footnote 5.

While writers ever since the creation of the United States Constitution have consistently refused to define "due process" with any degree of definiteness, I consider a procedure as described in the above quotation as being a violation of the prohibition directly within the commonly accepted interpretation interpretation of the doctrine. Section 4b would, as it was primarily intended to do, effectuate a "full and fair hearing" and thereby guarantee due process to the individual in that portion of the procedure where, were it omitted, judicial review of the most adequate kind would be only an empty form.

This is enough of an acquaintance with the preliminary procedure to consider the equally, if not more, important question of judicial review of the decisions of administrative boards. Section 5a of the Bill contains the formula for review. Any person aggrieved by the final decision or order of any agency or independent agency, may at his election file a petition (1) with the clerk of the United States Court of Appeals for the District of Columbia; or (2) with the clerk of the Circuit Court of Appeals within whose jurisdiction he resides or maintains his principal place of business or in which the controversy arose, for review of the decision or order. The agency must prepare and file with the reviewing court the original or a full and accurate transcript of the entire record in its proceeding. The court may affirm or set aside the decision or order or may direct its modification. If further evidence is desired, the court may remand the case to the agency for the taking of the same. The review is on the record alone.

The Court is directed to set aside a decision "if it is made to appear, (1) that the findings of fact are clearly erroneous, or (2) that the findings of fact are not supported by substantial evidence, or (3) that the decision or order is not supported by the findings of fact, or (4) that the decision or order was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing, or (5) that the decision or order is beyond the jurisdiction of the agency or independent agency, as the case may be, or (6) that the decision or order infringes the Constitution or the statutes of the United States, or (7) that the decision or order is otherwise contrary to law." (§5a). The judgment of the Circuit Court of Appeals is subject to review by the Supreme Court of the United States upon writ of certiorari or certification. (§5b). Where a court in review of an administrative holding "finds itself in disagreement with a previously rendered decision of another court having jurisdiction under this section", it must certify the question of law with facts and reasons to the Supreme Court. (§5d).

The basic purpose of this section is to provide a uniform procedure of judicial review. It is argued by the proponents of the Bill that this standardized method would also create a review of the decision itself where such, in many cases, is impossible today. Where no statutory right of appeal is provided, the courts have refused to review on the ground that as an attribute of sovereignty, the United States is not bound to provide a remedy in the courts, and, in the absence of "compelling language", they will not "substitute their discretion" for that of an administrative officer to whom the authority has been given. Nor will his determination of the facts be questioned unless arbitrary and capricious, nor his acts be nullified unless in violation of due process. (Dismuke v. U.S., 297 U.S. 167, and cases there cited). While a party may sue in a District Court for an injunction against an order of the agency (in most cases where no statutory procedure is set up), this remedy is not always adequate and sometimes most difficult to obtain.

Where statutory review is provided in the act creating the agency, Congress has often made the findings of fact by the board conclusive if supported by the testimony.

Criticism has been made (Kaufman, Is the Administrative Process a Fifth Column?, 6 John Marshall L.Q.1 at p.10) that the "substantial evidence" ground for rejectment is merely a restatement of the rule adopted and now observed by the courts. This is so, and it seems logical that no noticeable change will be affected by writing this rule into any law. The purpose of the bill is to allow an independent review, by a court, of both law and fact. If courts have applied this same rule in such a way that their review, except in unusual cases, has been restricted to questions of law, any expectation that they will digress from these precedents seems an idle hope.

The same writer, however, believes that the phrase "clearly erroneous" will guarantee an "independent judicial determination

of the facts." Although I admit that a court, eager to assume this duty of fact-finding, might seize upon this added ground as conferring such jurisdiction upon it, I believe that the effect of the wording is no greater than, but equal to, the "substantial evidence" rule. While it is true that an error of fact can only be determined by its relation to competing fact, for a finding of fact to be "clearly erroneous", it must border upon arbitrariness and capriciousness and its competing fact must be supported by a great weight of evidence. If the relation of the one fact to the other is of this character, then it would appear to be impossible to say that the former was supported by "substantial evidence", and it could be set aside on that ground. The substantial evidence rule does not mean any evidence, but enough to make the finding a reasonable one. A re-determination of the facts by an independent judicial body is a vital part of an adequate review of an administrative decision, and the bill was designed to effectuate that end. I think it has failed.

The argument that the Bill, by reserving all present rights available in the District Courts and the Circuit Court of Appeals (§7a), adds confusion to chaos in respect to procedure is minor. It does not go to the heart of the Bill. The drafters considered i it wise not to do away with present remedies until the efficacy of the new system had proven itself.

The question of judicial review is one of prime importance. The tendency to disregard our fundamental doctrine of separation of powers and place all power in the hands of the Administration is to invite oppression. The antithesis of this balance of power is Administrative Absolutism. Montesquieu, in his L'Esprit des Lois, says:

> "Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

It appears that the administrative agencies must legislate to a degree and perform certain quasi-judicial functions to cope with the present complex civilization, but these powers should be exercised under a form which allows protection of individual rights and liberty. No end justifies a means which sacrifices these safeguards.

The absolute requirement of a written record does more to produce the desired result than any other employed by the Bill. The psychological effect upon a board of putting its decision in writing in a record embodying all the evidence, plus the certain knowledge that a competent court will review this decision, and an avid press will seize upon any mistake it makes, is an important factor. Agencies, commissions, or boards, being composed of men, cannot lose their human characteristics.

The Walter-Logan Bill is not a perfect remedy for the problem confronting us, but it is a step in the right direction. If it does not succeed in all respects, it does lay a proper foundation for the Gargantuan task of reforming the administrative system. The 2-1 majority by which it passed the House of Representatives and its passage in the Senate, in spite of the Administration's active efforts to kill the Bill, are assurance of Congress' recognition of the need of some check on the recent concentration of power. I sincerely hope that this Bill, or an improved, amended version of it, will survive the veto.

RICHARD FREDERIC SCHWERZMANN

THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

The emergency measure of conscription is a matter of interest to many in the profession from both legal and personal standpoints. The personal aspects, we hear discussed everywhere. It affects not only the men actually called but all those other persons who are in some manner related to the activities and the lives of these men. It affects our business life, our home life, and our system of credits. It speeds up our mode of living, and this is bound to bring about some future change in our folkways and mores. The legal aspects are also interesting because this legislation in its present form may not prove to be the perfect answer for all our problems.

Of course, conscription is not new. Glenn, in The Army and The Law, says that it was born in 1793 in France by a decree of the National Convention, after England and Holland had joined the ranks of French enemies. It is a matter of record that there were forms of conscription used in the Thirteen States during the Revolution. Perhaps the universal conscription as first used in France is much more like the Act of 1940. One of France's soldierly enemies wrote this: ".....conscription, that mighty staff on which France leaned when all Europe attempted to push her down - the conscription, without which she could never have sustained the dreadful war of antagonistic principles entailed upon her by the revolution - that energetic law which he [Napoleon] freed from abuse and rendered great, rational and endurable by causing it to strike equally on all classes; the conscription made the soldiers the real representatives of the people." (Napier, Peninsular War, bk. 22). These words were written long ago but some of them have a familiar ring. The world is at war over antagonistic principles, and we, like France, seek to use conscription as a staff to lean upon in times when there seems to be a real danger that Europe may attempt to push us down. We, too, seek to make conscription strike equally at all classes so that our soldiers will be the real representatives of our people.

The first proposal of the Burke-Wadsworth Conscription Bill brought forth a great body of opposition, which threw its weight against the measure. Those who objected to conscription itself have presented their arguments forcefully. Those who objected to the principle of conscription were promptly overruled by a majority opinion. It was their contention that forty million Americans should not be tagged and numbered. They claimed that the inevitable consequence of any attempt to enforce widespread registration would be like those of 1917-1918. There were aspects of our World War experience which were indeed unfortunate. Raids on ballparks, theatres, restaurants, and railroad stations by police in search of non-registrants were commonplace. In Chicago, in four days during July, 1918, over 150,000 men were stopped by police and Federal agents and ordered to show their registration cards. In eastern New York and southern New Jersey, 51,000 "suspects" were arrested, directed to fill out cards and ultimately were released only after a check on the information given had been made. Senator

Caldwell stated, on the floor of the Senate, that he saw armed soldiers in New York City seizing men in theatres, street cars, and at work. The prisoners were then kept under detention until they proved that they were not "slackers." (See McMaster, The United States in the World War, Vol. 1). It is encouraging to note that this was not repeated. Such consequences are not to be welcomed by a free citizenry, for they are characteristic of the very regimes whose encroachments are most feared. However, our registration of 1940 was complete and orderly. The few exceptions which have reached the newspapers as oddities have not received a full public sympathy. It would appear that we have now a more substantial understanding in the body politic that there is an imperative need to be prepared. Most of us have a natural distaste for the abstract principle of compulsory military service, yet the opponents of the Burke-Wadsworth Bill have seen one of their strongest arguments fall before a countrywide co-operation.

It seems to go without saying that conscription in time of emergency is constitutional, yet it was not until 1939 and the decision in United States ex rel Bergdoll v. Drum, 107 Fed.(2d) 897, that the question was finally closed. Our experience with the matter has covered the long period from the Revolution to the present. The Constitutions of nine States recognized universal military service. At the time of the Revolution, the lack of power in the national Government, under the Articles of Confederation, to raise armies and provide for defense w s one of the defects to be remedied by the Constitution itself. A conscription act was proposed during the War of 1812, but the war ended before it could be acted upon. Our first Federal statute was enacted during the Civil War and the second - the Selective Draft - was enacted in 1917. The constitutionality of these acts has been tested, yet there has never been a decision which held them to be beyond the power of Congress. Perhaps the most famous decision is to be found in the Selective Draft Law Cases, 245 U.S. 366. The court stated: "It may not be doubted that the very conception of a just government and its duty to its citizens includes the reciprocal obligations of the citizens to render military service in case of need and the right to compel it." United States v. Schwimmer, 279 U.S. 644, and Kneedler v. Lane, 145 Pa.St. 238, follow the same general theory of a citizen's duty. It is a safe prediction that the law will be regarded by the courts as within the powers of Congress.

Conscription presents other legal questions. For instance, we have assumed that conscription would subject a citizen to military service - but what of aliens? A citizen is bound by reason of his allegiance. Is an alien bound by reason of his residence alone? We can call a citizen home from a foreign country and have him court-martialed for not answering a questionnaire (United States ex rel Feld v. Bullard, 262 U.S. 760), but it has been considered a violation of international law to compel an alien residing here to render military service. Certain writers (Borchard, Diplomatic Protection of Citizens Abroad, and Hyde, International Law, Vol. II) express doubt that compulsory military service is limited to citizens alone. They hold that aliens who have declared their intentions of becoming citizens, should be subject to mili-

tary service also. Our own Government had expressed the view that only citizens were liable (Conversations with the Netherlands in 1888), but the fact remains that aliens were drafted during the World War. They have been required to register in the Selective Training and Service Act of 1940. In 1917 the Act provided that only declarant aliens would be liable, but actually non-declarent aliens were held to service. It was necessary for aliens to claim exemption and, if the local board decided against them, the decision was final. (Napore v. Rowe, 256 Fed. 832; Ex parte Beales, 252 Fed. 177; Ex parte Lumachia, 250 Fed. 814). Even when our country had made treaties before the war which expressly exempted aliens from military service, the courts said that the treaty must bow to the Selective Draft Act of 1917. The courts held this because the treaty and the Draft Act stood on a parity and, in event of inconsistency, the last in time prevailed. Therefore, aliens who attempted to get relief under these treaties were left to depend entirely upon the political head of the Government for appropriate relief. (Ex parte Larrucea, 249 Fed. 981; Summertime v. Local Board, Division No. 10, 248 Fed. 832; Ex parte Blaxie Kovic, 248 Fed. 327). (See American Bar Ass'n Journal 26:701-5 §40).

Another interesting question of law when the Selective Service Regulations of 1917 were interpreted as providing that, if the registrant did not comply with a notice to report, he was classed as a deserter under the military law, although he had never served in the military forces. The Act of 1917 provided that, from the date of the draft, the draftee was subject to the laws and regulations governing the regular army. Hence, he was a deserter if he failed to obey the summons, although notice by mail was authorized and actual personal service was not required. (Ex parte Bergdoll, 274 Fed. 458). Under our present law, the Act of 1940, the situation has been changed by §11, which provides: "No person shall be tried by any military or naval court in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act, and unless he is subject to trial by court-martial under laws in force prior to the enactment of this Act."

When we come to consider this present Act of 1940, we find that there are those who would criticize it in some of its details. This is not because they are opposed to the principle of conscription, but rather because they feel that the Act is not fair or adequate in some of its particulars. Since conscription should be perfected as much as possible, it is necessary to consider these opinions if we are to eradicate many resulting evils.

If we are to take our citizens out of the rôles which they customarily play in ordinary life, and subject them to a year of military service because we feel that this is necessary for the preservation of our society, we must be sure that we protect and insure their return to their former mode of life. The Act provides that, at the completion of his year's training, each draftee shall be entitled to a certificate. With this certificate, if he is still qualified for the position which he was forced to leave, he can make application for re-employment within forty days of

his discharge from the Army, and his employer is required to restore him to his position, or to one of similar status and compensation, "unless the employer's circumstances shall have so changed as to make it impossible or unreasonable to do so." This does not apply to positions which originally were only temporay. Critics of the Act contend that "temporary" opens the door to vexing definition and fact discrimination, and they say that the words, "is qualified to perform the duties of such position", put all the risk of changing qualifications on the draftee alone. But until evidence is produced to show that these provisions are actually being used inequitably by employers, it would seem that they should stand as perfectly reasonable ones. There is no reason why an employer should be forced to take back a man whom he originally employed in a temporary job and for whom he no longer has any need. As we shall discuss later, these will be matters which will be controlled by the discretion of a Federal District Court. Surely all sympathy will be with the draftee in the determination of questions of fact. It does seem unfair at first glance to take a man from a job, compel a year's absence, and then refuse to allow him to return to the job because the position has in that time grown too skilled for him. However, there are bound to be some individual hardships under any law, and these cases will be relatively infrequent. I think that it will be well to let the law stand as it now reads until further experience shows that it is really impracticable.

The provision, "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so", is open to criticism as being too vague and too broad. It doesn't define "changed circumstances" at all. What is to be the legal interpretation of these words? Suppose that when a man leaves his job his employer finds another to take his place at a lower salary than he had been paying the old employee. Is this a changed circumstance which will excuse the employer from taking the draftee back? The barber shop down the street lost a barber in the draft. Now in his place there is a new man, but the new man is a ladies' hairdresser and a new business has been added to the barbershop. If the new venture is successful, the employer may be extremely reluctant to take back the draftee after the completion of his year's training, although the employee had worked there for eight years before 1940. Will the employer find protection in the "changed circumstance" provision? Will this, because it lies solely in the discretion of the individual judges, be subject to different interpretations in different parts of the country, so that one man in Texas might get his job back and yet another, under the same circumstances in Pennsylvania, might be refused his? The clause should be defined further and details added by the Congress before the time for enforcement arrives.

In the original Burke-Wadsworth Bill, it was provided that a failure to reemploy, or to keep the draftee employed for one year after his return, would render an employer liable to prosecution for unfair labor practice under the National Labor Relations Act. It also provided that under the N.L.R.A., the Federal District Courts might be asked to specifically require such employer to comply. This first appeared in the Senate Committee and was hastily

drawn and ill-considered. Representative Wadsworth himself expressed grave doubts as to its constitutionality. However, in view of the present attitude of the courts, it would probably be construed as constitutional if reasonably administered. Practically, it gave little promise of effective protection to the conscripted employee. In the first place, the N.L.R.A., under §10, applies only to those practices which "affect commerce." A failure to reemploy might not "affect commerce" at all. The Board was limited in jurisdiction to those businesses engaged in interstate commerce and was already operating on a reduced budget. It would have been overwhelmed by such an unrelated task. Employees of intrastate businesses would have to undertake private litigations in a Federal Court, and there was no provision for the repayment of expenses. Due to the adverse criticism of these provisions, the Act was changed. In its final form it provides in §8e that a draftee can file a motion, petition, or other appropriate pleading in the District Court of the United States and get compensation for any loss of wages or benefits suffered by reason of the employer's unlawful action. It also provides that these cases shall be advanced on the calendar and that the draftee can apply to the U.S. District Attorney, or comparable official, in that district, who shall act as his attorney. "No fees or court costs shall be taxed against the person so applying for such benefits." In addition, the Director of Selective Service, provided for in the Act, shall establish a personnel division with adequate facilities to render aid in the replacement of these men in their former positions, or in securing new positions for them. These provisions are of some real practical value. They give the draftee a remedy in court, with all expenses paid. And, a board is provided to help draftees find work at the end of their period of service. It is a quick remedy, and a man with an honorable discharge, at least has an effective means now of enforcing the provisions.

The most effective enforcement of the right of reinstatement may come from the application of the general penalty provisions of §11. It unequivocally declares that "....any person....who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act .... shall upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment..." There would seem to be no doubt that reinstatement of a returning conscript in accordance with the terms of the Act is a "duty required of" the employer "under or in the execution of the Act." Widespread denial of reemployment to returning conscripts would offer a very serious threat to the morale of the remaining trainees. It seems logical, therefore, that the courts will be anxious to enforce these penalty provisions of the Act along with the other protections already mentioned.

Section 8i of the Act is interesting. It reads: "It is the expressed policy [italics mine] of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act, such vacancy shall

not be filled by any person who is a member of the Communist Party or the German American Bund." It is clear that the employment of Communists and Bundists is not to be a crime, nor can the provision be enforced. It is simply a declaration of "policy." It was originally offered in the House by Representative Mundt of South Dakota, who frankly stated the reason for leaving in that form:

"We all know that constitutionally we cannot make this mandatory, but we can certainly set it up as the established policy and as the desire of this Congress that industry and business shall fill these vacancies with good loyal American citizens." (Cong. Record Sept.7,1940, p.17741).

The result sought is admittedly in violation of one of the most fundamental provisions of the Bill of Rights. World affairs, however, are influencing public opinion at the present time in a more effective manner than the Constitution, and it is probable that this "policy" will be accepted with approval by most of our citizens and voters. The ranks of labor will be diluted by conscription and the unions, faced with the task of organizing this large turnover of labor, will probably be embarrassed by this provision. The employer who is not disposed to take on new union men for those who have been forced to leave will use this "policy" as a vehicle. He can label a militant union member a "Communist" or a "Bundist" and refuse to employ him. There is a real danger in this because these terms are easily used and have frequently been applied incorrectly in the past. This may result in a serious disruption of the working of the machinery which we have set up for the settlement of labor controversies. One indication that the labor unions are well aware of this may be found in the recently negotiated collective agreements containing provisions for such protection. (See Int. Jurid. Ass'n. Bull. 9:33, 37-44 O '40). The well-meaning employer who seeks to follow the policy of Congress should require any person seeking employment to take an oath that he is not a member of the Communist Party or of the Bund.

The Act also criticized in its original form because it contained no suggestion as to mortgages, commitments, and loss of credits. It was said that it would result in the disintegration of any personal economy which the draftee had built, and that only a few wealthy men would be able to bear such a burden. The Act itself still contains nothing about deferring payments on conditional sales contracts and, in these modern times, we find a widespread use of this type of credit in trade. There are some provisions in the Soldiers and Sailors Civil Relief Act which have been taken from the same Act used in the World War, and these are even under the same section number. Before any default judgment can be taken in an action, there must be submitted an affidavit that the defendant is not at the time engaged in military service. There is a severe $1,000-penalty for a false affidavit. But §303 is new and it will allow the repossession of a motor vehicle or tractor or accessories under conditional sales contract, where less than half of the purchase price has been paid. So a young man with a new auto and a several hundred dollar investment, or a new tractor to be used on a farm, will lose all this because he must serve his

country. It does seem that the draftee is being called upon for enough personal sacrifice to merit a moritorium on his automobile contract. And it seems that the provisions of the Soldiers and Sailors Civil Relief Act could also be elaborated to meet modern conditions. Trade practices are different from the ones used in 1917, and thus the problems arising under them will be correspondingly different. The Act should be brought up to date and relief given to draftees who are in no way responsible for the conditions in which they find themselves.

Under the provisions of §5f, we find deferments given to college students; Subd.(2) of §5f provides for a deferment for graduate students who are engaged in study, "to the pursuit of which a degree in arts and science is prescribed as a prerequisite." A strict interpretation of this section would lead to the result that a student pursuing a course of study in law at Albany Law School, or any graduate school which did not require any degree as a prerequisite to such a course of study, would not be within the deferment granted by this provision. Also, students in normal schools or junior colleges which grant certificates but no degrees, would not have service deferred as they are not attendants "at any college or university which grants a degree in arts or science." However, the legislative history of this provision shows that it was the intent of the Congress to provide a broad deferment for bona fide students.

The following is an excerpt from the Senate debates (Vol. 86, No. 171, Congressional Record p. 18325 (Sept. 13, 1940)):

"MR. LA FOLLETTE: 'I merely wish to say that there is some misunderstanding on the part of some as to the actual meaning of Paragraph (f), which is the one relating to college students. I merely wanted to make certain that this applies to any person going to college for a bona fide reason, no matter whether he is a freshman or a senior, or whether he is taking a professional course or not. It gives him deferment until July 1, 1941. So that if a young man were a senior in a law school, entering this fall, he would have until July 1, 1941, to complete his course, as would a medical student, and so on.'

"MR. SHEPPARD (Chairman of the Senate Committee on Military Affairs) 'The Senator has the proper understanding.'"

Where the "plain meaning" of a statute would lead to an "unreasonable" result "plainly at variance with the policy of the legislation as a whole," the courts will follow that course rather than the literal words of the statute. (United States v. American Trucking Ass'n, 310 U.S. 534 [1940]).

The Regulations of the War Department also bear out this interpretation of a deferment for bona fide students working on substantially full-time courses towards recognized degrees or certificates, in any established college or university including junior colleges and normal schools. Night school students in one of these institutions would be included in the deferment in the Regulations, but those receiving instructions from correspondence schools would not be deferred.

About a month before the Act was passed, the President stated that: "Young people should be advised that it is their patriotic duty to continue the normal course of their education, unless and until they are called, so that they will be well prepared for greater usefulness to their country." Under the Act students will be able to perform that "patriotic duty" of continuing their education to a very limited extent. Their deferment ceases no later than July 1, 1941. The next session of Congress should be asked to consider the advisability of continuing the deferment of bona fide college students until their graduation from the institution in which they are now enrolled. From a practical standpoint alone this may make for a better defense. The Army thinks enough of a college education to require it in many of the more important branches of the service. It may be a wise procedure to let our young men fully prepare themselves so that they will be able to serve with greater usefulness when their time for training arrives.

The last criticism of the Selective Training and Service Act to be considered in this article is the one expressed by the strong voices of those interested in the protection of the rights of labor The A.F. of L., the C.I.O., and the big Railroad Brotherhoods objec to the way that the Act is drawn. They object mainly because it is drawn in the same manner as the Act of 1917. Labor received treatment under that Act which it does not wish to receive again. Both Acts fail to contain any suggestions for the affirmative control of the unconscripted portion of the nation; yet labor asserts that it was controlled under the Act of 1917 and fears that it may be coerced again. All that is provided under either Act is for the compulsory training of men for the armed forces. Those outside of the armed forces are not even mentioned. Labor points out that within a year after the Act of 1917 a new approach was inaugurated by anew section from the office of the Provost-Marshal-General. It provided that if anyone was observed by a local board to be an idler, or engaged in a non-productive occupation (waiter, elevator operator, doorman, hotel attendant, usher, domestic servant, sales clerk, etc.), the Board would notify him to appear before it and explain. If they found him to be so engaged they would immediately withdraw his order number or deferred classification, and he would become liable for immediate induction into the service. That was the now famous "Work or Fight" order. Labor correctly points out that through this order the draft became an exclusive weapon of the military, under which they had literally unlimited power. These interested parties ask that some protection be placed in the Act against such a use of the law. This is a reasonable request because the Congress has not voted in favor of a conscription of labor, yet the line between conscript labor and labor under direct military control is extremely tenuous. The Congress and the people may agree to the necessity of a conscripted army under exclusive military control. They may not agree that our present Act should be used to virtually subject every worker who stays at home to military direction as to his mode and place of employment.

Labor also declares that further protections should be added to the provisions which exempt workers in "necessary" indus-

tries from the draft. Anyone who seeks to claim such an exemption must file with his claim an affidavit from his employer. This affidavit states the facts of his employment, and it is a powerful weapon in the hands of an employer who may wish to rid himself of active union men. As Representative Geyer said to the House:"What employee that loves liberty and desires to stay with his family will dare to take the lead in organizing or perpetuating a labor union when he knows that to get a deferment from services, he must get an affidavit from his employer that he is essential to the industry? Few employers would deem him to be essential if he was interested in any kind of a union other than a company union. Yes, this is a bill to break the back of the labor movement." (Cong. Record, Sept. 5, 1940, p. 17602). This objection has some merit. It should be possible for the Government to provide some check of its own upon the "necessary" position of the claimant without putting him entirely at the mercy of his employer.

Labor further objects to the way that this "necessary" worker provision was used in the last war to coerce striking workers into returning to work under threats of losing their protection. They point out that the Senate Munitions Committee has mentioned that, since the attitude of military men may be hostile to strikers, even in peace, drafted skilled workers could be used as strike breakers in essential industries. The Chairman of the Senate Military Affairs Committee and the Senate Majority Leader stated before the Act was passed that it did not contemplate that men would be drafted and then sent out to a factory, whether privately or governmentally owned. Nevertheless, labor would like to see the right to strike protected in the present law. (See Int. Jurid. Ass'n. Bull.; 9:13, 15-20, Ag.'40).

In ordinary peacetime the situation might be different, but now it is to be questioned whether the great weight of public opinion supports labor in its demand for the right to strike in essential industries. We grow a little impatient, when we need airplanes in great numbers, to find airplane factory workers out on strike. Not only is the right to a protected strike opposed, but there is an increasing demand that strikes in essential industries be absolutely prohibited. The President, in his last "Fireside Chat", made some mention of this movement. The nation is becoming aroused to a serious impending danger and the resulting need for a highly perfected rearmament program. Conditions of labor are vastly improved since the years of the last war. People can live, if they can find jobs, under the present wage scales. Our Our draftees must work hard and give up their personal liberties for twenty-one dollars a month. Labor loses sympathy, in its complaints concerning the loss of the power to strike, with each increase in the possibility that the very life of our democracy may be at stake.

These are some of the provisions of the Selective Training and Service Act of 1940 which command a wide interest and which have been discussed everywhere by those who are most likely to be affected by them. The necessity for supplementary legislation to

alleviate some of the consequences which may be expected from the operation of the Act is apparent. The Soldiers and Sailors Civil Relief Act of 1940 has already been enacted to supplement the Selective Training Act and both of these Laws will need intelligent correction. We have much more experience behind us now than we had in 1914. There will doubtless be much discussion in the next Session of Congress centering around this most important problem. We shall need the stoutest possible staff to lean upon during the days ahead.

ARTHUR ARNOLD ARMS, JR.

THE PATIENT'S PRIVILEGE

Prior to the year 1828, there was no statute in any of the States forbidding a physician from disclosing confidential communications. In the year 1828, New York State led the way to a new type of legislative enactment - a statute declaring that information disclosed to a physician could not be divulged. This is provided for in §352 of the Civil Practice Act.

"A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurse may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry." In order to invoke the privilege granted by this statute, it must be shown that the relationship of physician and patient existed, that the information was acquired while attending the patient, and that the information is necessary to enable the physician to act in that capacity. (Griffiths v. Metropolitan St.R.R.Co.,171 N.Y. 106). A similar statute is in effect in more than half of the States.

Let us examine for a moment the policy of such a statute. The reason given for the privilege is stated in the report of the Commissioners on Revision of the Statutes of New York. They argued that since communications to lawyers are privileged in order that they may advise correctly, it is just as necessary to have the same protection in regard to consultation with physician. (Revised Statutes Report III at page 737).

Professor Wigmore disagrees with this reason for enacting the statute and states that the real support for the privilege seems to be mainly the weight of the medical profession's opinion pressing upon the Legislature, - an opinion founded on a natural repugnance to becoming the means of disclosure of a personal confidence. In rebutting the argument that because the communications to a lawyer are privileged, those to a doctor should also be, he points out the fact that the services of a lawyer are sought primarily for aid in litigation actual or expected while those of a physician are sought for physical cure, and that the rendering of legal advice would result directly and surely in disclosure of client's admissions. (Wigmore on Evidence, Vol. VIII §§2380-2381 3d ed., 1940). It is evident that Professor Wigmore has definite convictions that the privilege has been violated when he states, "The injury to justice by the repression of the facts of corporal injury and disease is a hundredfold greater than any injury which might be done by disclosure."

The question as to whether or not the courts should suppress such confidential communications was presented to the American Bar Association in 1937-38. The Committee on the Improvement of the Law of Evidence reported that the privilege was rarely invoked except in three classes of cases:

1. Where the mental capacity of the testator was in issue;
2. When the nature of the case was a personal injury action;
3. When the nature of the unsound person's health was in issue.

They reported that the odd thing about the privilege was that itwas usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, but which only the tribunal of justice must not learn about. The Committee made a recommendation to the effect that the presiding judge of a superior court should be allowed to compel such a disclosure if in his opinion the same is necessary to the proper administration of justice. This rule prevails today in the State of North Carolina (Ibid, at page 815). The basic reason, according to the Revisions Commissioners, for the Legislature sealing the doctor's lips in regard to information given him by a patient, seems to be that if the doctor was not pledged to secrecy the patient would not make disclosures that he would otherwise make and as a result would be denied proper medical attention. This point of view is expressed by them in their report when they state, "Unless such consultations are privileged men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art." Let us examine the reasoning behind this, bearing in mind that the statute has been invoked in preventing such confidential disclosures in court where it would be used as a part of the evidence. This being true, can we say that in a majority of the cases when a person consults a physician, he keeps back information because he expects that he will be involved in some future litigations, and he does not want to divulge his condition to the physician for fear that he might be called as a witness to testify against him. Such a line of reasoning by a patient when consulting a physician occurs in very few instances, if it occurs at all. Whenever one consults a doctor the real reason he does not disclose his true physical condition, perhaps some loathsome or disgraceful disease, is the fear that the doctor will tell of his condition - not to the court, but to other people in the community in which he resides. This last situation, I believe it can safely be said, occurs in the majority of the cases where the relationship of physician and patient arises. Is the statute then invoked to protect the patient from such a situation? Does it give him a right of redress from the doctor?

There is very little case law on the subject. In the case of Simonsen v. Swenson, 177 N. W. 831, a physician disclosed to a hotel keeper that his patient, plaintiff, had syphilis, in order to prevent the spread of the disease. It was shown that the physician was wrong in his diagnosis but the court could not allow the plaintiff to recover because the physician acted in good faith to prevent the spread of what he believed to be a communicable disease. So it seems according to case law today that there is no guarantee that a patient would recover in an action against a physician for disclosing confidential communications and that he must rely on his confidence in the ethical standard of his doctor. Such a breach of ethics on the part of a physician no doubt, could be taken care of by the American Medical Society which could perhaps cause the physician's license to be revoked but such action would be of little value to the patient. Therefore, we see that although everyone in the entire community may know of the patient's disease if a ques-

tion concerning it comes up in a court of justice, the same doctor who had told everyone about the plaintiff's physical condition cannot tell it to the court in order that the truth can be known.

The writer of this article, although he has expressed the arguments against the statute, does not believe that it should be revoked, nor does he feel that it will be. Although there is no case law on the patient's right to recover from a doctor who has violated the statute, I believe that one could recover if he could prove damages flowing directly from the physician's breach of trust. It is to be noted also that the Commissioners' reason for the statute, - that the patient would be hesitant about disclosures unless the privilege is given, - is not the only reason, as is shown by the language of the cases. Perhaps the fundamental and true reason for the court rejecting the testimony is stated in Davis v. Supreme Lodge Knights of Honor, 165 N. Y. 159.

"The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity naturally shocks our sense of decency and propriety."

So much for the privilege itself. Now let us consider the effect of its use. It can of course be waived as provided for in §354 of the Civil Practice Act. The party to an action may call a doctor to testify and to reveal his physical condition. Can an inference be drawn against a party's case because he invokes his privilege? In other words, can a party say that from the failure of the other party to call his doctor as a witness the jury can infer that his testimony, if it had been given, would have been detrimental to the other party's case? This situation came up in Penn.R.R. v. Durkee, 147 Fed. 99. In that case the plaintif brought an action to recover damages for personal injuries sustained in consequence of a collision between two trains. The lower court refused to charge that the jury had a right to infer, from the refusal of the plaintiff to permit her doctor to testify as to what he treated her for and what he found her condition to be, that his testimony would be unfavorable to her. The Circuit Court of Appeals, Second Circuit, sustained the refusal and stated that to hold that because the patient does not waive or abandon the prohibition, inferences adverse to his side of the controversy may be drawn by the jury, would be to fritter away the protection it was intended to afford. This is the best rule. To grant a person a privilege and then say that if he invokes it, his innovation of it can be used against him is to emasculate the privilege itself. This same line of reasoning is used when the courts refuse to allow any adverse inference to be drawn when criminals refuse to take the stand.

In the May, 1940, Harvard Law Review, one of the editors in discussing this subject, whether or not an adverse inference could be drawn when a patient invoked his privilege, made the following statement: "Some courts, however, distressed at the suppression of potentially vital evidence and questioning whether fear of publication in legal proceedings induces patients to be reticent with their doctors have held that invocation of the privilege justifies an adverse inference." He then cites cases to sup-

port his contention and one of the cases he cites is a New York case, Deutschmann v. Third Avenue R.R.Co., 87 App. Div. 503. Plaintiff in that case was suing for personal injuries nd the contention of the defendant was that the injuries suffered by the plaintiff were not the result of any occurrence for which the defendant was responsible but was the result of a disease with which the plaintiff was afflicted. The plaintiff put a doctor on the stand who stated on cross-examination that the plaintiff had been afflicted with a particular disease and had been treated. The defendant called a physician by whom he sought to prove the same fact further. Plaintiff raised the claim of privilege although she had previously called doctors to testify for her. Plaintiff's counsel then requested the court to charge the jury that a refusal to waive the privilege did not warrant the jury in indulging in any inferences unfavorable to her or to her cause of action. The court refused to charge and their refusal to do so cannot be severely criticized, since in this case the plaintiff had already given testimony as to her condition and it was fairly evident that she was trying to suppress some vital evidence. If no testimony was given at all by a party to an action no such inference should be drawn. This is the rule in this State and the courts of this State are not among those courts referred to by the Harvard editor as being "so distressed at the suppression of evidence" that they destroy the privilege of confidential communications by allowing adverse inferences to be drawn. The case of Travelers Insurance Co. v. Pomerantz, (124 Misc. 250, aff'd 218 App. Div 63, 246 N.Y. 63) is authority for the proposition The plaintiff insurance company wanted to rescind defendant's policy of life insurance because of certain misrepresentations of fact in his policy which were of a material nature. It was not established in the trial that defendant had a bodily or mental disease, but the plaintiff claimed that they would have been able to prove that the defendant had a disease if the defendant had not invoked his privilege and the plaintiff contends that the court should have been permitted to infer that if the doctors had been permitted to testify the disclosure would have been adverse to said defendant. The court held that no such inference could be drawn, since, if such an inference could be drawn the privilege would be of no value whatsoever. When the case was discussed in the Court of Appeals, they agreed with the lower court that no adverse inference should be drawn so this is the rule in this State. Professor Wigmore agrees with such a rule when he states, "When the privilege is claimed by a patient who is also a party, no inference as to facts suppressed can be drawn." (Wigmore, on Evidence, 1940 §2386).

JOSEPH AUGUSTUS SANTRY

THE NEW YORK ANTI-INJUNCTION LAW

In 1935, the Legislature of the State of New York, in an obvious attempt to emulate the action of Congress in enacting the Norris-LaGuardia Anti-Injunction Law, passed a bill placing restrictions on the power of the courts of this State to issue injunctions in cases arising out of or involving "a labor dispute." This law, which will hereinafter be referred to as §876-a of the Civil Practice Act, was aimed to lessen the availability of one of the most effective weapons the employer has had at his command in his long-standing dispute with the employee. The history of industrial relations in this country bears witness to the fact that very often courts have been willing to issue restraining orders that have curbed various activities in which labor has indulged, in order to gain its objectives against capital. The Act here under consideration is undoubtedly a legislative expression of the popular mind that the time has come in our economic and social order to heed once again the cry of labor in its demand for an improved and more equitable status in the economic scheme of things. There is abroad today a strong opinion that for too long a time now the capitalist has held the upper hand and that the time for equalization of position is at hand. The tremendous volume of social legislation of the past few years, of which this statute can truly be said to be a part, is a concrete expression of this liberal feeling.

As is always the case with revolutionary thought and action, peril lies in the fact that the change may be so sweeping as not to create the desired balance of the equities out of the present state of unbalance, but rather to shift the advantage to the party not now enjoying it. It is our purpose to review the efforts of the courts of this State in applying and interpreting this statute in an effort to determine whether in fact the desired equality of status has resulted, or seems likely to result, or, on the other hand, whether the unjust burden has now been placed on the shoulders of the employer.

Little argument will be forthcoming against the proposition that the courts of this State have been truly liberal and progressiv in dealing with the problems which have presented themselves in cases arising out of industrial disputes. However, the restrictive provisions of §876-a indicate that the Legislature sought to insure the continuance of this beneficent attitude toward labor and to remove such remnants of the conservative mind on the matter as might still pervade our judiciary. A cursory glance at some of the provisions bears out the truth of this. Before the court may issue the injunction it must find that substantial and irreparable injury to complainant's property will follow unless the relief is granted, that unlawful acts or breach of a contract not contrary to public policy has been threatened or committed, that there is no adequate remedy at law, that public officers have failed or are unable to furnish adequate protection for complainant's property and that greater injury shall befall the complainant by the denial of the relief than will fall upon the defendant by the granting thereof.

The court may not restrain the defendant from striking, boycotting, peacefully picketing or peacefully urging others to do the same. In these provisions is found formidable protection for the rights of the employee at the cost of imposing a strenuous burden on the employer and it is of prime importance that our courts summon all the wisdom and prudence at their command in applying the statute so that injustice may not result from the protection becoming too sweeping and the burden too great.

The cases arising under §876-a demonstrate the fact that the courts' greatest difficulty has been the determination of what constitutes "a labor dispute." Imperative, indeed, it is that the court reach a fair and reasonable conclusion as to what constitutes such a quarrel, for the contrary finding will press down upon the party seeking injunctive relief under the broad provisions of the act, thereby creating a situation as inequitable as the one which the statute seeks to avoid. Subdivision 10 of the law defines the meaning of "labor dispute" as follows:

> "(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or association of employers and one or more employees or association of employees; between one or more empleyers or association of employers and one or more employers and association of employers; between one or more employees or association of employees and one or more employees and association of employees; or when the case involves any conflicting or competing interests in a labor dispute (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).
>
> "(b) A person or an association shall be held to be participating or interested in a labor dispute if relief is sought against him or it, and he or it is engaged in the same industry, craft, trade or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.
>
> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

The courts have found it impossible, even under the statutory definition, to reach a definite answer as to what constitutes a

dispute. A complete formula cannot be ascertained, and consequently the circumstances of each individual case necessarily play a large part in the ultimate determination of the court as to whether the statute in hand applies. However, one thing seems certain - there must be "employment." The controlling case on this point is Thompson v. Boekhout, 273 N.Y. 390. Plaintiff therein was the operator of a motion picture theatre, employing one Meyer as a projectionist. Upon the latter's discharge and the assumption of his duties by the proprietor, defendant union began to picket the premises in order to force the plaintiff to again hire Meyer. Upon the application for an injunction restraining such picketing, the union claimed that a "labor dispute" was involved and that relief should be denied to the plaintiff on the ground that he had not complied with §876-a C.P.A. In answer to this, at page 393, the court says: "Where the owner of a small business seeks to avoid labor disputes by running his business without any employees, an attempt to induce or coerce him to hire employees on terms satisfactory to such persons associated in such attempted inducement or coercion is not a labor dispute within the letter or spirit ofthe statutory definition."

The same doctrine was applied in Gipps v. Osman, 173 Misc. 53. Plaintiff there conducted a small hosiery establishment, employing one assistant. Union representatives demanded union pay for the man. The man was discharged and no one hired in his place. A strike call was issued and picketing of the shop undertaken. Upon the application for the injunction to restrain this activity, the question as to the applicability of §876-a was decided thus: "Labor dispute may exist regardless of whether the employer hires one worker or a great many but there must be an employer.***** In the case of a single employee, where employer-employee relations are interrupted by differences, a labor dispute exists if the position continues, e.g., where another is hired or there is an intention to fill the place at a later time, perhaps when the dispute terminates. If there is the opposite intention, namely to conduct the activities without employees, then there is no employer and no labor dispute."

In Miller v. Fishworkers Union, 170 Misc. 713, the court took the stand of the Thompson case (supra), under an almost similar set of facts, the difference being that the business was a family partnership and the partners carried on the work of the discharged employee. The union raised a novel objection in demanding the application of §876-a, stating that it was entitled to a contract to cover future employment by the plaintiffs if the necessity for such arose. The very argument itself, said the court, discounted the idea of the existence of a present labor dispute as would require compliance with the statute.

Boro Park Sanitary Live Poultry Market v. Heller, 280 N.Y.481, illustrates a situation in which the principle now being discussed is not applicable. Plaintiff was a corporation with four brothers and their mother as sole stockholders. The men assumed the manual work formerly performed by discharged members of the defendant union

and picketing ensued. The court said, in discussing the question of a labor dispute, that the medium of stockholding could not be used as a pretext to enable plaintiff to say that the corporation had no employees and that therefore the doctrine of the Thompson case (supra) had no application to this particular set of facts. This decision came even in the face of a finding of fact that the brothers had been denied membership in the union on the ground that they were "bosses." A vigorous dissent in the case pointed out that the situation was identical with the family-owned business in the Miller case (supra) and declared that the corporate entity should be swept aside and §876-a be deemed not applicable. Appealing as this thought may be, especially in the light of the inability of the brothers to join the union, we feel that the case has been well decided and that those who partake of the benefits of the corporate entity should not be heard to complain of its burdens.

The most recent decision of the Court of Appeals on the point appears in Baillis v. Fuch, 283 N.Y. 133. Plaintiff partners there had thirteen employees who had designated the defendant union as their bargaining agent. A strike was called by the union when plaintiffs refused to enter into a new agreement concerning pay and hours. Since that time, no others were hired but the brothers carried on the work themselves. This practice was concededly to avoid "a labor dispute." Plaintiffs claim that they do not intend to hire any new employees and there is proof that they would have hired the old ones at the same wage scale. A claim is made, chiefly on reliance in the Thompson doctrine, that §876-a has no application. The court, admitting that there must be "employment", rejected the contention that the Thompson case controlled, saying, "In the present case the drivers were in the plaintiff's employ when the strike was called and the strike related to terms of employment. There can be no question, therefore, of the existence of 'a labor dispute', and the application of §876-a of the Civil Practice Act." We are unwilling to follow the court in its reason that the fact that the strike preceded discharge makes this case different from those previously discussed. We find it difficult to glean from the opinion whether or not it was found that the partners had a fixed intention to carry on permanently without employees. If such was their intention, then there was no such employment as the court concedes must exist and we believe it immaterial that such lack of employment was the result of a strike and a refusal to rehire and not the result of discharge. To hold otherwise is to say that the union can coerce the employer to rehire the strikers even in spite of his desire to carry on without any help. It may well be that the plaintiffs here did not have the intention of which we speak and if the court was of that mind in reaching its decision, the case can be said to have been properly distinguished from the Thompson case (supra) and the others supporting the doctrine contained therein.

While the courts have consistently held that there must be employment, yet the term has not always been taken to mean that the person against whom the activity sought to be restrained is directed must be the employer of members of the union. The case of Goldfinger v. Feintush, 276 N.Y. 281, reveals a situation illustrating

this point. Defendant union, having failed to unionize the employees of a manufacturer of kosher meat products, proceeded to picket the retail stores which sold these products. Plaintiff in the case was a retailer. The court held that §876-a applied there since there was a unity of interest between the actual employer and the person being picketed, since the plaintiff was engaged in the same trade as the employees (Subd. 10-a, supra), and there is no need under the terms of the law for the disputants to stand in the relation of employer and employee (Subd. 10-c, supra).

The same holding appears in Davega City Radio Inc. v. Randau, 166 Misc. 246. There plaintiff sought to restrain picketing of his establishment by the striking employees of the Brooklyn Daily Eagle, in which publication the plaintiff was then advertising. The court held that a labor dispute existed under Subd. 10-c of the statute. In the case of Mlle. Reif, Inc. v. Randau, 166 Misc. 247, on the same set of facts the exact opposite holding was forthcoming. We feel that the last cited case is the better decided, being of the mind that the unity of interest between the actual employer and the person picketed, stated as controlling in the Goldfinger case (supra was decidedly lacking here, since the parties were not engaged in the same trade. Gertz Inc. v. Randau, 162 Misc. 786 , concerns newspaper employees picketing an advertiser, and §876-a was held inapplicable.

A further case dealing with the "unity of interest" doctrine is Weil & Co. v. Doe, 168 Misc. 211. Plaintiff, a furniture dealer, had hired his men under a union contract with the C.I.O. and no dispute existed between employer and employee. Plaintiff erected a sign made by non-union labor. A sign painters' union began picketing. The court said: "The link between the picket and the picketed must be of greater strength than here revealed; the affinity must be more direct and intimate and united than the relationship between the plaintiff and these defendants.****If §876-a applies here, it would be difficult to contemplate a case where it would not."

In Hydrox Ice Cream Co.Inc. v. John Doe, 250 A. D. 770, the plaintiff was a manufacturer and distributor of ice cream. It furnished its customers with signs advertising its product. The signs were made by the Breyer Ice Co., Inc., and were hung by its employees. Both the plaintiff and the second corporation were wholly owned subsidiaries of the National Dairy Products Company. The court held that the sign painters' union which picketed the plaintiff's customers was engaged in a labor dispute with the plaintiff, the distinction between the corporate entities being swept aside. Undoubtedly the "unity of interest" is present here and we believe it to be a proper case in which to disregard the corporate structures.

An interesting phase of the question appears in those cases where the employee is evidently satisfied with employment conditions yet action is taken against the employer by a union for the purpose of forcing him to comply with its requirements regarding employment terms. In Bent Steel v. Doe, 170 Misc. 736 , it appeared that the

employees of the plaintiff were well satisfied with conditions, yet when plaintiff sought injunction against picketing, the court denied relief on the ground that a labor dispute existed and demanded compliance with §876-a and found that plaintiff had failed to comply. Fairchild v. Friedman, 172 Misc. 146, is to the same effect. on very similar facts. Bond v. Turner, 258 A.D. 763, however, reveals a lack of agreement with this doctrine. There, the plaintiff, a clothing store corporation, sought to restrain the picketing of its premises by a union, no members of which were employed by the plaintiff. Affidavits of the employees were filed revealing the fact that all was serene between the employer and the employees. A closed shop agreement was the object of the union. There was also evidence in the case that only three out of a total of 63 clothing store salesmen in the city belonged to the union. On this state of facts, the court held that there was no labor dispute such as required compliance with §876-a. We feel that here the interpretation of the statute is too narrow, but we will withhold our reasons until discussing the latest pronouncement of the Court of Appeals on the point involved in cases of the type instantly being considered.

The aforementioned decision is found in May's Furs & Ready-to-Wear, Inc. v. Bauer, 282 N.Y. 331. Plaintiff operated a retail store employing about 300 clerks. These people had banded together in an independent employees' association of which the general manager of the plaintiff was president. The association was co-plaintiff in the action. The defendant union picketed the store in order to gain recognition as the bargaining agent of employees there. The corporation sought injunctive relief and put forth the contention that there was no labor dispute. The court thought otherwise and, in applying Subd. 10 of 876-a, said: "The case at bar arises out of employment and the representation of employees. The disputants are an employer of retail store clerks and an association of retail clerks of this particular employer on one hand, and a labor union composed of retail store clerks on the other hand. These facts lead to the inescapable conclusion that the case at the bar arises out of a labor dispute as defined by §876-a."

In this case, then, we have a re-affirmation of the principle that the interests of a labor union are not confined to acts directed against an employer of its own members. Picketing, provided that it be lawful, is a proper means of spreading union influence and of inducing any employer engaged in the same trade as the union to create union conditions in his establishment. Union contracts today contain 'closed shop' agreements which are looked upon as legal. Consequently it seems to us that the decision in the Bond case (supra) is overruled by this latest decision of the high court. In the case, the objective of the union was to extend unionism by inducing an employer to sign for a closed shop, when in fact there were, at the time, no union employees. Here, in the May case, (supra), there were no union employees and recognition as a bargaining agent was desired by the union. To our mind the situations are parallel.

In bringing our discussion of §876-a to a close, we make the following observations from the foregoing review of the principle cases dealing with the question of "a labor dispute." First of all, it is apparent that the courts have given to the statute a construction which is neither too narrow nor too liberal. In Baillis v. Fuch, (supra), the court might have gone too far in protecting the employee, while in Bond v. Turner (supra), the employer was given the benefit of the doubt. Nevertheless, since there is a question of the employer's intention in the Baillis case, as we pointed out in our review of it, and as the Bond case has been weakened, if not overruled by the subsequent decision of a higher court, no charge of strained construction can be leveled at the courts. Secondly, we believe that the statute has brought about the elimination from our courts of the influence of the anti-labor jurist and has, therefore, strengthened the court as an agency for the dissemination of social justice. The apparent objective of the lawmakers to preserve and advance the liberal attitude of our courts toward labor has been achieved. All in all, then, §876-a has worked no hardship; it has brought uniformity of judicial mind, and has brought the state of our law a step nearer the goal of all law, - complete and substantial justice for all.

JOHN JAMES McCALL.

DUE PROCESS DISAPPEARS

In recent weeks we have found ourselves approaching the Advance Sheets of the United States Supreme Court Reports - when we approach them at all - with somewhat the same apprehension we feel when picking up the newspapers to read the war news. One can never tell what new horror will be contained therein.

This did not lessen the shock we received, however, upon reading Wisconsin v. J.C.Penney Co., 61 S.Ct. 246. A United States Supreme Court, already characterized by many as a body of liberals, leftists, or radicals, depending upon the politics of the speaker, has apparently gone overboard completely.

A Wisconsin State statute imposed a tax on the privilege of declaring dividends out of income derived from business done within the State or from property located within the State. The amount of the tax was 2-1/2% of the amount of dividends declared by all corporations, both foreign and local. The question before the court was whether the tax so imposed on foreign corporations violated the Due Process Clause in the Fourteenth Amendment to the United States Constitution.

The majority of the Court held in substance that since the State was granting something - the privilege to do business - it could exact a tax in return, and that the tax was therefore legal. The Court says, in a five-four decision, that the State may, at any rate, tax foreign corporations doing business within the State, by way of an income tax on earnings attributable to the corporation's Wisconsin activities. The tax here in question was fixed by the same formula used in ascertaining an income tax, resulting in one tax on income when the corporation receives it and another tax when the corporation pays it out to stockholders in the form of dividends. The lower court (the Wisconsin Supreme Court) called this a privilege tax instead of the income tax which it really is, but it is the operation of the statute which determines its validity, not the descriptive words used in the statute. Therefore, says the Court, the tax is valid as a supplementary income tax, even though contingent on events occurring outside the State!

Mr. Justice Roberts writes an able dissent with which three of his colleagues concur. He assumes (not a rash assumption until the Court reached the above decision) that a state can not tax property or transactions of citizens residing in foreign jurisdictions, nor set down conditions upon which foreign corporations shall do business within the borders of the state, and then add further burdens as to whch the state has no competence to legislate. He adds that application of the principle mentioned in the majority opinion shows the tax is still a tax on privilege, no matter what the Supreme Court may call it, and that the Court can not correctly term it an income tax. The respondent here received income from a great many states; this was taxed and then sent to the home office where it was administered as the respondent saw fit. Some went toward the payment of salaries, some for new buildings and equipment,

and some was paid out in dividends. The manner of disbursement, says Justice Roberts, had no relation to how the money was earned and did not depend on any law of Wisconsin, yet the State assumed to tax that method of disbursement even though the money was beyond its sovereign jurisdiction. The State arbitrarily assumed that a certain amount of the dividends declared by the corporation came from its earnings in Wisconsin, and taxed them accordingly. The tax is on the stockholder in reality, since he does not receive the amount due him in the absence of a tax. The corporation is merely a collection agent and is liable only if the stockholder does not pay the tax. Thousands of the stockholders so taxed are not residents of the State which is taxing them!

A noted teacher once said that when anyone said a thing was obvious, he was either a fool or didn't understand it. To us, it is obvious that the majority opinion upholds a statute that is unconstitutional in that it violates the Due Process Clause. The reader, if we have one by this time, may take his choice.

No one would argue with the proposition that the validity of a tax is not dependent on what the Legislature may call it. We concede that a real property tax might be valid even though it were denominated an income tax. On the other hand, it is beyond our comprehension how any process of reasoning, especially by a mind that is supposed to be logical and well trained in the law, can bring one to the conclusion that a privilege tax (we quote the statute itself) on stockholders is in reality an income tax on the corporation. As suggested in a recent edition of the Lawyer Service Letter of the New York State Bar Association, the Court may have become so involved with words and their meaning in the instant case that the point in issue was lost in a mass of words and phrases.

Consider the first point raised in the majority decision - that because the State has granted a privilege, it may impose a tax in return. The Court did not say, nor can we believe it intended, that the "asking in return" could be an unconstitutional demand, yet that is just what results from the decision. One might as well say, as the dissent points out, that because the State gave the privilege, it could tax realty belonging to the corporation but situated in a foreign jurisdiction, merely because that realty was purchased with funds that may have been earned in Wisconsin.

The reader will notice here a similarity to those cases in which a United States taxpayer sues the Federal Government because he believes the money he pays in taxes is being misapplied. Such a person seldom has a standing in the United States Courts, because he can not show that it is his money which is being spent unlawfully. Yet in the J.C.Penney case, the State Legislature assumed without reason that the money spent on dividends was earned within the State (at least in part), and the same Court that throws the taxpayer out of court upholds the assumption.

The J. C. Penney case is even more startling in view of the recent decision of the same court in Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77, 58 S.Ct. 436. The Company did business

in California under license from that State, in this case, and contracted with other insurance companies doing business there to reinsure them on policies of life insurance written in California, on California residents. The contracts were made in Connecticut, premiums were paid there, and settlements were made there. The State of California taxed the privilege of doing business within its borders, basing the tax on the gross amount received from premiums, and sought to include in that amount the sums received from the reinsurance contracts. The Court held that the tax was invalid, since the incidence of the tax was outside California's jurisdiction. No act regarding the reinsurance contracts took place within the State, and performance of the contracts did not depend on any authorization from California.

The Court distinguishes this from the J.C.Penney case by saying that the tax in the latter instance is related to transactions outside the State, and that the measure and incidence of the tax are tied directly to earnings which the State of Wisconsin made possible. Could not one say that the Connecticut General Insurance Company made the reinsurance contracts because California allowed it to do business within the State? The two statements seem equally logical. It is asserted that the Connecticut case involved transactions in no way related to the State. It would seem to us that this is true of the J. C. Penney case. The distinction is too nebulous, in our opinion, to justify the court in arriving at any conclusion other than that both taxes are unconstitutional. The inconsistency may be demonstrated by means of a chart:

	J. C. Penney Case.	Connecticut Case.
Foreign Corporation?	Yes	Yes
Doing business in State?	Yes	Yes
Transaction took place outside the State?	Yes (declared dividends elsewhere and there is no evidence the dividends were earned within State)	Yes (made contracts elsewhere)
Tax on transaction constitutional?	Yes	No

By the simple expedient of calling a privilege tax on A an income tax on B, the Court has thus whittled away a large part of what was left of the Due Process Clause. The law student is taught that the Law consists of a body of concepts or principles applied to concrete instances. If the highest court in the land can alter those principles by merely juggling words, it would seem that the time isn't far off when the best students of the Constitution will be left groping in the dark - if indeed they are not doing so already - and that the most efficient way to settle a case will be to flip a coin.

GROVER NELSON NORTH

RUDMAN v. BANCHERI

This case, Rudman v. Bancheri, 175 Misc. 417, presents a question involving the interpretation and definition of the term, malpractice, as used in the Civil Practice Act, §50 subd. 1. This section provides that an action to recover damages for malpractice must be commenced within two years of its accrual.

The complaint in this action alleges that the defendant was a duly licensed pharmacist. It sets forth the following averments: that the plaintiff requested the defendant at his pharmacy to put up and sell to the plaintiff a salve to reduce the swelling on her hand; that the defendant negligently, recklessly, and carelessly informed her that a surgical treatment would be proper, and that he was equipped to so treat her; that, relying upon this assurance, she submitted to surgical treatment by the defendant, who negligently, recklessly, carelessly, and without proper training, equipment or qualification, applied an instrument at the location of the swelling, causing an incision to be made which resulted in certain injuries.

The summons and the complaint were served almost three years after the occurrence complained of by the plaintiff. The defendant moved to dismiss the complaint on the ground that the gravaman of the action was malpractice, and was, therefore, barred by the two-year limitation.

Justice Kadien, in his opinion, stated: "No authority, either in the Appellate Division, this Department, or in the Court of Appeals, has been submitted to or found by the court in its research." He decided, after weighing briefly the opinions in Monahan v. Devinny, 131 Misc. 248, modf'd and aff'd 223 A.D. 547, (Third Department), and the opinion of the Appellate Division, First Department, in Isenstein v. Malcomson, 227 A.D. 61, rev'g 133 Misc. 691, that this was an action to recover damages for personal injuries caused by the alleged negligence of the defendant, and, therefore, the three-year statute of limitations governed. He stated: "Since there is no decisive authority either way binding upon this court, and the views expressed by Mr. Justice McAvoy in the Isenstein v. Malcomson case (supra) are more in accord with the personal views of this court than are those in Monahan v. Devinny (supra), the motion [to dismiss the complaint] is denied....."

The determination of Mr. Justice Kadien seems to me to be open to criticism. These three questions should have been considered by the court:

1. Is a pharmacist, who negligently performs his duties, guilty of negligence or malpractice?

2. Is a person who irregularly or illegally practices medicine guilty of malpractice?

3. Was the defendant in this action practicing medicine irregularly?

Mr. Justice Kadien answered this first question by holding that the pharmacist was guilty of negligence. The Isenstein case (supra) which he approves, held that a registered nurse was not guilty of malpractice when negligent and careless in the performance of his duties as nurse. This seems to me to be the correct conclusion, and in line with the intended meaning of the section.

The Court of Appeals, in a Memorandum Opinion, Federal International Banking Co. v. Touche, 248 N.Y. 518, held that the section under consideration did not apply to an action against public accountants for negligence. It gave a suggestion as to its interpretation of the section. "Section 50, subdivision 1 of the Civil Practice Act, insofar as it prescribes a limitation in actions to recover damages for malpractice, refers to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons and others practicing a profession similar to those enumerated."

The question arises as to the meaning of the phrase, "profession similar." The definitions of the term, malpractice, show that it has been confined in its use to surgeons, physicians and dentists. The term has been defined in 48 Corpus Juris 1112 as "bad practice either through lack of skill or neglect to apply it, if possessed"; "negligent performance by a physician or surgeon of the duties which are devolved and incumbent upon him on account of his contractual relations with his patient"; "bad or unskillful practice by a physician or surgeon whereby the patient is injured."

Dentists, (Pickelcup v. Gibbons (La.), 120 S. 504), oculists, (Stern v. Lanng, 106 La.738) and X-ray manipulators, (Antowill v. Friedman, 197 A.D. 230), have all been determined to be engaged in "professions similar." Research did not disclose any authority for the proposition that persons engaged in any activity other than the actual practice of medicine were guilty of malpractice.

In Greenfield v. Gilman, 140 N.Y. 169, it was held that the profession of a pharmacist and that of a physician are essentially distinct, and that an agreement not to practice in one did not preclude the party from engaging in the other. The only authority for the proposition that a druggist is engaged in a "profession similar" is the case Monahan v. Devinny, 131 Misc. 248. Dictum of the court held that the term malpractice applies not only to licensed physicians and surgeons, but also to irregular practitioners as well as to nurses, midwives, and apothecaries. The only support to this dictum was a reference to certain writers on medical jurisprudence who had used the term in a general way. The Appellate Division, in modifying the determination of the lower court, did not mention this dictum. In view of the common usage of the term and the differences inherent in the two professions, and in view of the authorities cited, it would seem that to construe the term malpractice as applicable to pharmacists would be to stretch it to its breaking-point.

In his treatment of the case, Mr. Justice Kadien did not consider any question other than the one already stated. He should hav

proceeded further. He should have considered whether or not a person, practicing medicine illegally, is guilty of malpractice within the meaning of this section. The purpose of this short statute of limitations for malpractice was not to give licensed physicians and surgeons an indulgence simply because they were regularly practicing medicine. It was rather to limit the time for bringing an action based on faulty medical treatment of disease, because the results attending the treatment of disease are difficult to trace as time goes on. It is as difficult to trace results arising from the treatment of disease by a person not legally licensed to practice medicine as by a person who is a qualified physician. It would seem reasonable, therefore, to apply this section to persons irregularly practicing medicine.

Monahan v. Devinny (supra) is a case directly in point on this proposition. In this case, an action was brought for personal injuries against a chiropractor practicing medicine without a license more than two years, but less than three years, after the cause of action accrued. The defendant moved to dismiss the complaint on the ground that it was barred by the two-year statute. The motion was granted.

Isenstein v. Malcomson (supra) is not an authority against this proposition, nor inconsistent with the Monahan v. Devinny case (supra). The court decided in the Isenstein case that a nurse was not engaged in a "profession similar" to that of a physician. The case is no authority for the proposition that a nurse, for example, would not be guilty of malpractice if she negligently treated a patient, not as a nurse, but as a person illegally practicing medicine. Consideration of that question was not necessary to the decision. There is language in the case which seems to be directly contrary to the view of the court in the case under consideration. The court, in the Isenstein case, made a statement which implies that its decision would have been otherwise if the nurse had been illegally practicing medicine: " ***nor is there anything in the text of this complaint which indicates the gravamen of the action is other than negligent conduct and reckless, careless and incompetent performance of common duties of a person engaged in an employment for such specified duties as distinguished from lack of or improper performance of work requiring purely professional skill." This is the case the court, in Rudman v. Bancheri (supra), cites as more in accord with its views on the matter.

At this point it would be well to distinguish the case under consideration from the Malcomson case (supra). If reference is made to the second paragraph of this paper, it will be noted that the complaint alleged: "that the defendant negligently, recklessly and carelessly informed the plaintiff that surgical treatment would be proper, and that he was equipped to so treat her, that*****she submitted to surgical treatment by the defendant*****" It will be observed that the allegations, which the court in the Malcomson case suggested would change its determination, are present in the case under consideration. Since this element is present, it is difficult to understand the statement of the court that the Malcomson case is in accord with its views.

In Brown v. Shyne, 242 N.Y. 176, it was held that chiropractors, whether licensed to practice or not, are held in the treatment of their patients to the standard of care and skill required of regular physicians. This would seem to be some authority from the Court of Appeals that an unlicensed physician would be guilty of malpractice if he unskillfully treated a patient.

The court, in Musser's Executor v. Chase, 29 Ohio State 577, and in Nelson v. Harrington, 72 Wis. 591, applied the term malpractice not only to regularly licensed physicians and surgeons, but also to others who held themselves out, professionally, as being able to treat the human body and cure disease.

This discussion leads us into a consideration of the final question: Was the defendant in this action practicing medicine illegally? I think that the question must be answered in the affirmative.

The Education Law §1251 provides: "No person shall practice medicine unless registered and legally authorized...." Section 1263 provides that a violation of this section is a misdemeanor. The term, practicing medicine, is defined in §1250 subdivision 7, as follows: "A person practices medicine within the meaning of this article.....who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition."

Compare this definition with a definition of the term, practicing pharmacy. Bishop, in his book, Non-Contract Law, states: "One who practices as a druggist whether under a license or not, holds himself out as competent to do this [fill prescriptions], but not to prescribe as a physician....."

Objection might be raised to the holding that the defendant was illegally practicing medicine, on the ground that the evidence and facts do not show more than an isolated transaction of this nature. This objection is not tenable. The Court of Appeals has held that the conviction of a defendant should be confirmed for a violation of this section of the Education Law (supra) when it was shown that she offered to perform an abortion, necessary instruments being available. (People v. Masromino, 148 N.Y. 454). In view of this decision, it is immaterial that this was perhaps the only time the defendant offered, or attempted, to perform a surgical treatment. This case is also authority for holding that the defendant was illegally practicing medicine. In the Rudman case (supra), the defendant actually performed a surgical treatment; the facts are much stronger in this case. The defendant went much further than a mere offer to perform an operation. It would seem, therefore, that the defendant was practicing medicine.

In this article, my contention has been, conceding that the

court was correct in its holding that an action against a pharmacist for a negligent performance of the customary duties of his profession must be commenced within three years, it erred in its final determination of the question by its failure to consider the matter fully. It was pointed out that the case Isenstein v. Malcomson (supra), upon which the court relied to support its view, was not in point. Actually, this case contained dictum which was contrary to the view of the court. It has been noted that the Legislature did not define the term malpractice. Since the Legislature did not do this, it is reasonable to infer that it intended the term to be interpreted in its usual and customary meaning. The courts in the past have used the term as descriptive of negligent treatment of a patient by either a regularly or irregularly practicing physician. It follows that this is the interpretation of the term which the Legislature intended to be applied to §50 subdivision 1 of the Civil Practice Act. Therefore, since it has been shown that the defendant in this action was irregularly practicing medicine, §50 Subdivision 1, should be applied. It follows necessarily that the motion to dismiss the complaint should have been granted.

DUNTON FORT TYNAN

AN EXTENSION OF FEDERAL CONTROL

On December 16, 1940, the United States Supreme Court decided in a 6-2 decision, the Chief Justice not taking part, the case of United States v. Appalachian Electric Power Co., 61 S.Ct. 291, better known as "the New River Case." The decision of the court increased the scope of the Commerce Clause and presented new theories in the method of determining whether or not a stream was navigable. This decision has been discussed frequently and in some cases greatly criticized by the gentlemen of the press. One writer, Mr. Arthur Krock, in commenting on the case before the opinion of the court was delivered, stated that if the case was decided in favor of the United States it would "let down what legal bars remain against the most extreme New Deal public power activity that may be contemplated." (New York Times, Oct. 16,1940) Other writers state, in a more humorous vein, that the power of the Federal Government has been enlarged to such an extent that "anything more than a heavy rainstorm is navigable, therefore licensable, therefore regulatable", (Time, December 30, 1940); also that "it is not unlikely that hot water bags might be considered navigable waters and therefore subject to Federal control." (H.I.Phillip's Column). The fact that the decision might be tainted with politics is expressed in another paper, which points out that five of the six who agreed with the majority opinion were Roosevelt's appointees. Of course it is not unnatural to find such comments in the press, but let us examine the case, putting aside sensational elements which are valuable from a news editor's point of view but not from that of a lawyer.

The case involved the question whether or not the Federal Power Commission had a right to demand that the Appalachian Electric Power Company take out a license to construct a dam as required by the Federal Water Power Act of 1920. The Act permitted the licensing of dams on navigable waters and also on unnavigable waters when it was found by the Commission that the interests of interstate and foreign commerce would be affected. The question was then presented whether the Radford Dam project on the New River was one that could be licensed or, in other words, was the New River navigable? A consideration of the proposition over a period of five years and a wavering of the Commission as to its opinion on the navigability of the River, was finally brought to a head on June 8, 1931, when the Power Company brought an action against the Commission to remove a cloud on its title and to restrain interference with the rest of its property. While the action was pending, the Commission took a firm stand (due, perhaps, to the fact that it was made an independent body and could function more efficiently), and adopted a resolution that the New River was navigable. The Power Company, however, ignored the finding and started the construction of the proposed dam, and the present suit was instigated when the Commission sued to enjoin such construction without a license. After a trial, in an opinion reinforced by formal findings of fact and law, the District Court decided that the New River was not a navigable water of the United States, and

that respondent's (Power Company) dam would not obstruct the navigable capacity of the Kanawha River, of which the New River was a tributary. The Circuit Court of Appeals, with one judge (Justice Parker) dissenting, affirmed and the United States Supreme Court granted certiorari (61 S.Ct. 297).

Let us now consider the Supreme Court's opinion. The two most important aspects of the Supreme Court's opinion are: First, the determination of the navigability of the New River, and, Second, the constitutionality of the Federal Power Act of 1920. The first aspect will not be considered. The Court admitted that whether or not a river was navigable was a question of fact, and that it had in the past been the rule that the concurrent findings of fact of two lower courts if supported by substantial evidence would be accepted by them, (Brewer-Elliott Oil Co. v. U.S., 260 U. S. 77 at 86), but to term the question as one of fact "cannot obscure the diverse elements that enter into the application of the legal tests as to navigability." (61 S.C. 298). Thus the Court deviated from the old rule that had been well settled, and accepted the petitioner's (United States) challenge to convict the lower courts of error in determining the credibility, weight and relevance of the evidence received by them. The court's second deviation from rules previously considered well settled, was its application of novel doctrines to the facts as to whether or not the River was navigable. The former rule as expressed in the case, The Danial Ball, 10 Wall. 557 at 563, was that "....Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways of commerce..... And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction to the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.". A broader interpretation of this rule was then for the first time invoked, when the court stated that natural or ordinary condition refers to "volume of water, the gradients, and regularity of the flow", and, further, that the natural and ordinary condition of the stream, however impassable it may be without improvements, may be considered navigable if by "reasonable" improvements the stream may be rendered navigable even though such improvements have not been made. (61 S.Ct. 299, 300).

It was with these two novel doctrines that Mr. Justice Roberts and Mr. Justice McReynolds quarreled, for these doctrines were the basis of the dissenting opinion. First, in regard to the right of the Court to review the facts as to the navigability of the River, neither Justice could find any justification. They were of the opinion that the Court should adhere to the "two-court rule" as to finding of fact. Second, as to the doctrines applied by the Court in considering the River navigable, the justices stated that

"Congress can create navigability by deciding to improve a non-navigable stream", and also that "if this criterion (reasonable cost of improvement) be the correct one, it is not seen how any stream can be found not to be navigable, nor is it seen why this Court and other Federal Courts have been at pains for many years to apply the test mentioned when the simple solution of the problem in each case would have been to speculate as to whether at 'reasonable' cost, the United States could render a most difficult and forbidding mountain torrent suitable for the least pretentious form of water traffic." (61 S.Ct. 311, 312).

A perusal of the majority opinion will show that there was an attempt to justify the objections raised by the dissent. As to the first objection, the Court seemed to feel that when it dealt with issues such as those presented in this case, facts and their constitutional significance were too closely connected to make the "two-court rule" a serviceable guide. The Court also limited its decision by stating that it did not purport to lay down any single difinitive test, but it was applying prior decisions with due regard to the dynamic nature of the problem, and to the particular circumstances presented by the New River. (61 S.Ct. 297). It is also to be noted that as to the second objection presented by the dissenting opinion, Congressitself had recognized navigable waters as those "which either in their natural or improved condition" are used or suitable for use. (Water Power Act of 1920 §3 Subd.8). It is not unnatural for the Court to note, and to try to apply, to a certain extent, the opinion of the legislative body. It is also unlikely that the Court will in the future extend the doctrine of "reasonable" improvements to any absurd degree. The fact that Congress had made appropriations to render the New River navigable, and had given up the attempt, was presented by the dissent, but it was not made clear that the reason for giving up the attempt was that it could not be made navigable at "reasonable cost." By implication, the dissenting opinion would have you believe that was the reason.

The Court went to great lengths in considering the geographical facts concerning the River. These facts have been omitted in this discussion since only the main questions of law have been note

Let us turn now to the second aspect of the opinion - the constitutionality of the Federal Power Act of 1920. The dissenting opinion did not consider this, since it reversed on the ground that the River was not navigable. In this aspect of the decision, the Power Company had its objections; first that the license required by law contained provisions unrelated to navigation and beyond the constitutional authority of Congress. Particular sections of the Water Power Act were objected to by the respondent, notably those which allow the National Government to regulate the internal management of the licensee company. Section 10(d) is one which requires the licensee of the National Government to maintain amortization reserves out of surplus earned after the first twenty years above a specified reasonable rate of return, these reserves to be applied to reduction of net investment. Section 14 of the Act, an acquisi-

tion clause, gave the United States "the right upon the expiration of a license to take over and operate the project by paying the licensee's 'net investment', not to exceed the fair value of the property taken. However, the right of the United States or any state or municipality to condemn the project at any time is expressly reserved." The respondent's objections, in which forty-one states also joined as amici, were that the United States' control of the waters is limited to control for the purposes of navigation. In answer to this the court pointed out that the right of the Federal Government to control flood protection, watershed development, and recovery of the cost of improvements through utiliization of power, has always been upheld under the commerce clause, and cited various cases on the subject. (61 S.Ct. 308). The court went on to say "that authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce....The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." (61 S.Ct. 308).

The second objection of the respondent was that the acquisition clause was a denial of due process, as it would allow the Government to take property at a price fixed at less than a fair value in the eminent domain sense, at the time of taking. The court granted that it would be possible for the land to pass to the Government at a price less than its value, since the Government would only have to pay for the land and not for water power, but held that that was the price responents must pay to secure the right to maintain their dam. (61 S.Ct. 309).

The third and last objection by the respondent and the states what joined in the argument, was that certain rights of the states were being invaded since some of them had Water Power Acts which were operating effectively and which should not be interfered with by the Federal Government. The Court answered this by stating that at the formation of the Union the States delegated to the Federal Government authority to regulate commerce among the States, and that so long as the things done within the States by the United States are valid under that power, there could be no interference with the sovereignty of the state. This of course is perfectly true as far as it goes, but it depends on whether or not the court has made it clear that the acts done were valid, which is of course the subject of a great deal of controversy today.

The court again limited its opinion in this second aspect of the case, stating that it was not predetermining in regard to licensing power the rights of different sovereignties in the future, and that its decision was limited to the particular facts in this case.

It is interesting to note that 117 years ago when Chief Justice John Marshall wrote the decision in Gibbons v. Ogden, 9 Wheat. 1, a similar but much more heated controversy arose over the question of state sovereignty versus national sovereignty. That decision, which is the basis of Federal control over navigable

waters, was rendered thirty-five years after the Commerce Clause went into effect, and was promulgated by the development of the use of steam in transportation. There have been further developments in the social and economic life of this country. The use of hydro-electric power as a means of generating electricity has developed rapidly within the past few years. This use was the subject of controversy in this case. There has also been a political trend in this country, regarding the increased importance given to national sovereignty, and the decreased importance given to state sovereignty. The National Government has been engaging in practices which before had been considered encroachments on the power of the States, but which now are considered an aid to the States. Whether or not you think this trend is wise depends to a great extent upon whether you are of the Hamiltonian school of thought, believing that national sovereignty is more important than state sovereignty for the proper functioning of our Government, or whether you are of the Jeffersonian school of thought, believing state sovereignty to be foremost in importance.

JOSEPH AUGUSTUS SANTRY

N O T E S

MINERSVILLE SCHOOL DISTRICT v. GOBITIS.- The United States Supreme Court, in a recent case, Minersville School District v. Gobitis, 310 U.S. 586, indicated its belief that saluting the flag is a custom which all school children must observe, regardless of individual religious belief. Though the case has no direct relation to the National Defense Program, the decision indicates the Court's reaction to the present emergency, and perhaps will serve as a precedent for cases arising as the Executive Department intensifies its search for so-called "Fifth Columnists", who are either working secretly for the disruption of the Government, or who refuse openly to display their allegiance to the United States.

The facts are briefly as follows: Lilian and William Gobitis, aged twelve and ten respectively, were expelled from school for refusing to salute the Stars and Stripes and to recite the oath of allegiance. The Gobitis family were members of Jehovah's Witnesses, a sect which adheres strictly to the letter of the Bible. This group maintains that the 20th chapter of Exodus in the Bible declares such a practice to be a form of idolatry. Mr. Gobitis was forced to place the children in private schools, both children being within the age limits of compulsory education in Pennsylvania. However, finding the expense of such schooling too severe for his meager income, Mr. Gobitis brought this action to enjoin the board from enforcing the order of expulsion and from requiring the salute as a condition of attendance.

Obviously, the clash is between religious freedom and public policy. Religious freedom is protected from Federal infringement by the First Amendment, and from State infringement by the Due Process Clause of the Fourteenth Amendment. Nevertheless, it has been held by the Supreme Court that fundamental rights and liberty are subject to reasonable regulation under the police power. In all prior cases concerning flag laws, for example, Leoles v. Landers, 184 Ga. 880, and Gabrielli v. Knickerbocker, 12 Cal.2d 85, appeals from state decisions upholding compulsory flag salute have been dismissed on ground that no constitutional question was involved.

In a recent New York case, People v. Sandstrum, 279 N.Y. 523, the Court of Appeals, holding that the evidence was insufficient to convict defendants for failure to keep their children in school, stated, under identical facts, by way of dictum, that the custom of saluting the flag was not idolatry - that the custom was necessary in the interests of national unity. This case was not appealed to the Supreme Court. It is interesting to note that this dictum was followed by the Supreme Court in deciding the case under consideration. However, in the Gobitis case, religious liberty was involved and the Court was at last given a chance to express its views. Mr. Justice Frankfurter, writing the opinion of the Court, declared that such legislation was justified as a reasonable exercise of the police power (an order of a board of education has the same force as a statute). Mr. Justice Stone dissented.

Justice Frankfurter asserted in substance that, without a united populace, the benefits of a democracy could never be realized; that the fundamental right of religious freedom was secondary to the sovereignty's right to preserve the Government which offers such liberties; that the Stars and Stripes are a vital factor in our unity. He quoted the case of Halter v. Nebraska, 205 U.S. 34: "The flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense.....it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggressors."

Strict constructionists will argue that the court is "flag waving" in order to justify an absolute infringement of liberty. However, in view of the emergency, it is this author's humble opinion that the decision is not only correct but vital to our national welfare. Can a democracy be deemed arbitrary for asking every person who is enjoying the benefits of such a government to comply with certain patriotic customs, which by their very age have proven their worth?

J.J.B.

* * * *

People v. Rytell, 284 N.Y. 242.- This case, decided November 19, 1940, contains a very interesting application of §543 of the Code of Criminal Procedure. In order properly to understand the question involved, a statement of the facts and circumstances leading to the appeal is necessary.

The defendant was convicted in the Montgomery County Court upon a charge of assault in the second degree and received an indeterminate sentence of not less than two years and not more than four years in a State prison. Upon appeal to the Appellate Division the judgment was "modified" by a closely divided court "to a conviction of assault in the third degree"; the sentence was reduced to the time already served by the defendant and the defendant was discharged. (People v. Rytell, 259 App. Div. 755). Permission was granted by one of the dissenting justices of the Appellate Division to the People to appeal to the Court of Appeals.

The Court of Appeals decided, as a matter of law, that the reduction of the conviction to assault in the third degree was an arbitrary use of discretion by the Appellate Division and not warranted by the evidence. The powers and duties of Appellate Courts upon appeals, permitted by the Code of Criminal Procedure, are defined by §543 of that Statute. Subdivision 1 of that Statute reads: "Upon hearing the appeal the Appellate Court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the verdict or finding; in all other cases they must either reverse or affirm the judg-

ment appealed from or reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offense of which the defendant or defendants have been convicted and in cases of reversal may, if necessary or proper, order a new trial." Subdivision 2 of the same section provides: "Upon hearing an appeal from a judgment of conviction of a felony, where, in its opinion, the record does not sustain the judgment with respect to the degree of the crime found but does warrant a judgment of conviction of a lesser degree of such crime, or of a misdemeanor, the Appellate Court may modify and correct the judgment in accordance with its opinion, in whole or in part, and affirm the judgment as so modified and corrected."

In defining the power of an Appellate Court under this statute the Court says: "The power of a jury in a criminal case to reject, though unreasonably, evidence which is uncontradicted and unimpeached, and to extend mercy to an accused by finding a lesser degree of crime than is established by the evidence, cannot be challenged in an Appellate Court. The statute was not intended to confer upon an Appellate Court a similar arbitrary power. Judicial 'opinion' must always be based upon the record and the applicable rules of law, and this court may review a decision of the Appellate Fivision which modifies a judgment of conviction by reducing the degree of crime, and must determine whether there is any sound foundation for the 'opinion' that 'the record does not sustain the judgment with respect to the degree of the crime found but does warrant a judgment of conviction of a lesser degree of such crime.'"

The court having found the original conviction of assault in the second degree to be correct, the interesting question arises as to which sentence the defendant must serve. In this case the court determined that the Appellate Division did not err in extending mercy by reducing the sentence. One judge, however, voted to remit the matter to the Appellate Division to reconsider the sentence. The majority of the court says: "Within the limits fixed by statute, the Appellate Division has plenary discretion as to the punishment which should be meted out, and the exercise of that discretion is not subject to review by this court. (People v. Speiser, 277 N.Y. 342). The sentence as reduced by the Appellate Division does not transcend the limits fixed by the statute for the punishment that may be meted out either for an assault in the second degree or in the third degree."

People v. Speiser (supra) presented the question concerning the power of the Court of Appeals, under §543 of the Code of Criminal Procedure, to reduce the sentence imposed on the defendant. It was held that under this statute, the Appellate Division has complete jurisdiction to reduce the sentence imposed on the defendant. The court says further: "In examining the power of this Court, however, §543 must be read in connection with §§7 and 8 of Article VI of the Constitution. Pursuant to §7, except where the judgment is of death or where, in civil actions, the Appellate Division, on reversing or modifying, makes new findings, our jurisdiction is limited to the review of questions of law. The provisions of §8 which confer upon any 'appellate court' the power to modify a judg-

ment must necessarily exclude power by this court to modify on questions of fact or discretion except in the two instances provided for in §7. In reviewing a judgment of conviction for a misdemeanor or for a felony other than a capital offense, we can no more review the appropriateness of a discretionary sentence than we can the weight of evidence or other elements which do not include questions of law. The Court of Appeals has no power to act in accordance with §543 of the Code of Criminal Procedure to reduce the sentence."

The rule would therefore seem to be that an arbitrary reduction of a sentence by the Appellate Division is not subject to review by the Court of Appeals as long as the reduced sentence is within the limits of punishment set by the Legislature. Nevertheless, the fact remains that the defendant has had his sentence reduced for the crime of which he was originally convicted. The sentence for the crime of assault in the second degree was not reduced by the Appellate Division. The Court reduced the sentence after determining that the defendant was guilty of assault in the third degree. It would seem that the Court of Appeals has circumvented the statute. In effect the Court of Appeals has reduced the sentence by deciding that the sentence of the Appellate Division "Does not transcend the limits fixed by the statute for the punishment that may be meted out either for an assault in the second degree or in the third degree." By such a review is not the Court deciding that the reduced sentence is appropriate? Are they not substituting their discretion for that of the Appellate Court in deciding that the sentence of the County Court should not be reinstated? The proper procedure would seem to be to remit the matter to the Appellate Division to reconsider the sentence.

The present decision is couched in terms which will probably destroy its value as a precedent and will restrict it to the peculiar facts involved. In the concluding paragraph the Court says: "We do not say that the classification of the crime may not be an important factor in the determination of the sentence, or that where this court finds error in the classification of the crime it should not at most times remit the case to the Appellate Division for a reconsideration of the appropriate sentence. Here, however, the statute expressly provides that even assault in the second degree may be punished by imprisonment in a penitentiary, and the record leaves no room for doubt that the court measured the sentence by the quality of the act and not by its classification."

We do not doubt the futility of returning this particular case to the Appellate Division, inasmuch as they could and probably would continue the same sentence. As a matter of procedure, however, this would seem to be the only proper method.

J. W. B.

* * * *

Pratt v. Daly, 104 Pac.2d 147.- The highest court of Arizona handed down an opinion in this case which might well, it seems to me, open up an entirely new and fruitful field of litigation. The action was

by a Mrs. Daly, housewife, against George Pratt and B. J. Moore, saloonkeepers, for damages in tort caused by the sale of intoxicating liquors to Mr. Daly after the defendants had been informed by Mrs. Daly of her husband's habitual drunkenness, and after she had requested them not to sell him any more liquor. She recovered $500 actual and $500 punitive damages.

The court based its opinion on Hoard v. Peck, 56 Barb. 202, a New York case which involved the sale of laudanum to a wife for drinking purposes. In that case, even though the vendor was given no actual notice to cease selling the laudanum, the defendant was held liable. The court, in that case, strongly implied that, though laudanum and liquor are not precisely the same, yet, in a proper case, such an action would lie for the sale of liquor to the plaintiff's spouse.

The court further noted Holleman v. Harward, 56 Am.St.Rep. 672. This case was similar to Hoard v. Peck.(supra), except that here the druggist had been told by the husband that he should only sell laudanum to Mrs. Holleman on his order. A recovery was permittex, and, here too, the court implied that such a recovery might be had against the vendor of liquor, providing the facts warranted it.

The court also noted Flandermeyer v. Cooper, 40 L.R.A.N.S. 360, with approval. This was a suit against the vendor of morphine to the plaintiff's husband. The court here allowed a recovery despite a want of actual notice that the vendee was a drug addict. They held that the regular sale of a habit-forming drug to plaintiff's husband was sufficient notice of any results which might normally flow from the regular use of such a substance.

It seems, however, that Pratt v. Daly is unique, since intoxicating liquors are not necessarily or absolutely habit-forming, and it seems that until this case the courts had always presumed drunkenness to be a voluntary act. But in this case the court said: "But there are substances which, when consumed steadily, effectually destroy the power of the consumer to cease their use, and also injure or destroy his normal physical and mental health. In such cases the consumption and sale of the substance are merged and become the act of the vendor, and the sale is the proximate cause of the loss of consortium and the consumer is not guilty of contributory negligence since he has lost his volition to act. We think that liquor may, in some cases, be one of these substances, except that the court won't presume that its use will result in loss of volition, so the plaintiff must show that the defendant knew that the consumer had reached this stage."

The only distinguishing feature, then, between drug and liquor cases is that of notice; the principle involved in each instance is the same. In the former case, the very nature of the substance itself is construed as notice to the vendor of its probable effect on the vendee, and if that effect results, the vendor is liable. In the latter case, however, actual notice to the vendor that the vendee is incapable of resisting the liquor is necessary in order to create a liability on the vendor's part.

Should this case become the law in the majority of the States, it will certainly make a broad extension of the law of torts. It may be, however, that the courts of other States will concur in the opinion of the Arizona Chief Justice who dissented solely on the ground that this decision was judicial legislation.

It seems to me, however, that in logic and reason, this principle is nothing more than an extension of the common-law right of recovery for the sale of habit-forming drugs to the plaintiff's spouse. It seems to me that, in certain cases, liquor is equally habit-forming and that its use destroys the power of the consumer to resist it. In such a case, providing that proper notice is given to the vendor, it seems reasonable that the spouse should have a right of recovery.

How far this principle may or should be extended is a matter of conjecture only. I am inclined to doubt that the vendee himself could recover from the vendor, even with notice; yet if there is no contributory negligence he should, in theory at least, be permitted to recover. I cannot see, however, that he has in any way been damaged directly, and I doubt that any cause of action exists in his favor comparable to the right of a spouse to recover for loss of consortium.

E.A.T.

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BLOOD TESTS IN PATERNITY DISPUTES

The fact that the blood tests now known to science and in present use can not prove paternity but can only, in certain cases, disprove it, is regarded as common knowledge to the lawyer and the law student. However, the general background, history, and use of these tests may not prove to be so well known, and this article is written primarily with that fact in mind.

Landsteiner can be credited with having laid the foundation for the blood-grouping tests. In and around 1900, he discovered the existence of four different blood groups distributed throughout the population. They were found to be present at birth and to remain constant throughout the life of the individual. These distinct, separate groups of blood result from the varying occurrence of two agglutinable (so called because the agglutination or clumping reaction is employed for their demonstration) blood factors, designated as A and B. They derive their names from the presence or the absence of these two substances in the blood.

Group O has neither A nor B factors; Group A has the factor A only; Group B has just the B factor; and Group AB possesses both A and B factors. At the time of his discovery, Landsteiner pointed out that these blood differences were important in determining the successful outcome of blood transfusions. The donor and the recipient must be within the same blood group, otherwise the same clumping reaction occurs in the circulation, with serious and sometimes fatal consequences. It was not until 1924, however, when Bernstein advanced his theory of the heredity of the blood groups, that it was suggested that the blood test might be used in paternity disputes.

Without going into the complications of Bernstein's theory (See The Use of Blood Tests in Paternity Disputes, by Philip Levine, M.D., Pamph. 1937), it is sufficient to mention that two rules based upon it have been evolved: 1, The dominant properties of A and B factors can never appear in the blood of a child unless present in the blood of one or both parents; 2, A parent of blood group AB cannot have a child of group O; and a parent of blood group O cannot have a child of group AB; for example, if the mother belonged to blood group A, the child to group B, and the alleged father to group A, the accused man could not be the father of the child, since the child possessed an agglutinogen B which neither of the supposed parents had. Since there are only sixteen possible matings, the following table has been made:

Alleged Father	Known Mother	Impossible	Possible
O	O	A, B, AB	O
O	A	B, AB	A, O
O	B	A, AB	O, B
O	AB	O, AB	A, B
A	O	B, AB	O, A
A	A	B, AB	O, A
A	B	--------	O, A, B, AB
A	AB	O	A, B, AB
B	O	A, AB	O, B
B	A	--------	O, A, B, AB
B	B	A, AB	O, B
B	AB	O	A, B, AB
AB	O	O, AB	A, B
AB	A	O	A, B, AB
AB	B	O	A, B, AB
AB	AB	O	A, B, AB

This is substantially the classic AB method of blood testing by means of which, it is estimated, one-sixth of all falsely accused men can be exonerated.

The second blood test devised and used by science is the so-called MN system which is separate and distinct from the AB method. In 1928, Landsteiner and Levine discovered tne M and N blood factors. These are, like the four previously ascertained blood groups, already present at birth and constant throughout life. On testing all human bloods with M and N agglutinins, these three blood combinations are possible: 1, A blood containing only the factor M; 2, A blood containing only N factor; 3, A blood containing both the M and N factors. Again, as with the AB system, factor M cannot be present in the blood of the child unless it is present in the blood of one or both parents - the same rule holding also for N factor. The second rule is, that a father or a mother M cannot have a child N, nor can a father or a mother N have a child M.

Type of Parent	Impossible	Possible
M x M	N, MN	M
N x N	M, MN	N
M x N	M, N	MN
M x MN	N	M, MN
N x MN	M	N, MN
MN x MN	------	M, N, MN

In actual practice, the simpler test for A and B is first made and, if no exclusion is found, proof of non-paternity may be made in the tests for M and N. With the use of both systems, the number of cases in which an exclusion can be obtained has been doubled, so that one out of three falsely accused men can be exonerated.

As I mentioned earlier, these two blood tests do not answer the age-old question, "Who is the father?" They can only, in certain instances, answer the question, "Who is not the father?" The blood-composition of a child may be some evidence as to the child's paternity, but thus far it can be used negatively only, i.e., to evidence that a particular man cannot have been the father of a particular child.

Professor Wigmore brings out by analogy the logic upon which the blood tests are based: "A customer of the Belleville Bank comes to the bank president on Tuesday with a $10 bill handed to him on the Monday before by one of the tellers. This bill has turned out to be counterfeit. The president would like to know which one of the tellers gave this bill to the customer; but the customer doesn't remember which teller he dealt with. The banker, referring to the records of the bank, finds that on Monday each teller was supposed to receive for distribution packages of bills $1, $5, $10, $20, and $50 denominations; but the records show that on this Monday Tellers No. 1, 2, 3, and 4 did receive the usual packages but by inadvertance Teller No. 5 was given no $10 package. It follows that Teller No. 5 is exonerated from having been the one to pass out the counterfeit $10 bill. It doesn't, however, follow that the passing of that bill can be fixed upon either Tellers No. 1, 2, 3, or 4; it might have been any one of them, but no particular one can be fixed upon by that evidence."

In a filiation proceeding, for example, if the blood tests divulged that the child had blood of the AB group and the alleged father blood of the O group, he could not possibly be the father - in other words, he would be excluded just as Teller No. 5 was in the analogy. At the same time, four other men subjected to the blood test who were found to have either group A, B, or AB could not be proven to be the actual father since any number of men belong to these groups and naturally there is the possibility of coincidence.

Turning now to the use of these blood tests in the law courts we find that the German legal authorities became convinced of their reliability at an early date, and such tests were ordered, about 1925, in all cases in which illegitimacy was an issue. The courts of Austria, Sweden, Denmark, Italy, Russia, Poland, Japan, and England soon followed Germany's lead. As early as 1929, statistics were compiled showing that there were 546 exclusions out of 6,665 tests, or 8.2%.

In the courts of the various States, throughout the United States, the blood tests, however, did not receive such a ready or favorable reception. However, a Pennsylvania District Court, in Commonwealth v. Zammarello, 17 Pa. O. & C. 229 (1931), ordered a new trial in a criminal action for fornication and bastardy, where the jury returned a verdict of guilty despite uncontradicted blood test evidence which established the non-paternity of the defendant, on the basis of such evidence. The appellate court of South Dakota held, in 1933 (State v. Damm, 62 S.D. 123) that the refusal of the trial court to order a blood test at the request of

a defendant charged with the crime of rape was not an abuse of his discretion. The opinion itself seemed to indicate very strongly that the validity or worth of the tests was not generally accepted as a scientific fact among medical men, and, for that reason, the court's refusal to take cognizance thereof was not an abuse of discretion. However, upon rehearing of the case, the same judge in an additional opinion explained very carefully that the former opinion was not intended to mean that the blood test was not as yet generally established or recognized by the concensus of expert medical opinion, but that it did not sufficiently appear from the record in that particular case. Further along in his opinion, the judge stated, "It is our considered opinion that the reliability of the blood test is definitely and unanimously established as a matter of expert scientific opinion entertained by authorities in the field and we think the time has undoubtedly arrived when the results of such tests made by competent persons and properly offered in evidence should be deemed admissible in a court of justice whenever paternity is in issue." This, then, tends to point to the acceptance by the law court of the reliableness of the blood tests.

In New York, the first case regarding the use by the courts of the blood tests in paternity disputes, was Beuschel v. Manowitz, 151 Misc. 899 (1934). That was an action for damages for a carnal assault resulting in the birth of a child. The defendant requested that the judge order the testing of the blood of the parties under the authority of §306 C.P.A., which provides: "In an action to recover damages for personal injuries, if the defendant shall present to the court satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court by order shall direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge...." The trial justice, in granting such an order, stated in effect that the courts naturally would not permit the application of scientific tests which had not attained definite and dependable results accepted generally by those best qualified to judge, but the blood-grouping tests were generally accepted by the medical profession and should be accepted by the courts. This decision, however, was reversed upon the ground of lack of power to compel submission to the test. (See 241 A.D. 888; 242 A.D. 641; 265 N.Y. 509.) In the case of Taylor v. Diamond, 241 A.D. 702, a paternity proceeding, the court held that in the absence of statutory authority, the Court of Special Sessions could not compel blood tests to be taken. From these two cases, it can be seen that the courts of New York considered it up to the Legislature of the State to recognize the scientific value of the tests as evidence, that is, such statutory authorization was necessary before the courts could compel submission to the tests. (Cf. State v. Damm, supra, which states that such a power is inherent in the courts and requires no legislative sanction.)

In 1935, the Legislature of New York saw fit to recognize the scientific value of the tests as evidence, and passed laws empowering the courts to order the taking of blood tests and accepting their results in evidence. (Laws of 1935, Chap. 196: Added a new C.P.A. §306a, Blood Grouping Tests. Wherever it shall be relevant to the prosecution or defense of an action the court by order shall direct

any party to the action and the child of any such party to submit to one or more blood group tests; the specimens for the purpose to be collected by duly qualified physicians and under such restrictions and directions as to the court or judge shall seem proper. Chap. 197: Amended the inferior criminal courts Act by inserting new Subd. 1-a: Court on motion of the defendant shall order the making of one or more blood-grouping tests by a duly qualified physician and the results thereof may be received in evidence. Chap. 198, Domestic Relation Law §126-A.)

And so, the thought, expressed by Professor Wigmore, that insofar as Science has shown definite and dependable results, accepted in general concensus, it can expect Law to rely upon its discoveries, appears to have been carried out.

The first case reaching the Appellate Division after the passing of the statutes was Flippen v. Mainhold, 156 Misc. 451, - an action to recover damages for breach of contract for the support of plaintiff's child of whom the defendant allegedly was the father. The plaintiff made application for an order directing the defendant to submit to one or more blood-grouping tests pursuant to §306-a of C.P.A. Plaintiff by these tests sought to obtain further proof of defendant's paternity. The court held such an order could not be granted since the tests were not relevant to the prosecution of plaintiff's cause of action - even a positive result would furnish no satisfactory proof of defendant's paternity. The court stated that it would simply indicate the possibility of paternity and it would be improper to draw an inference of paternity where merely the possibility is shown. In other words, it held that while §306-a of C.P.A. did not expressly so state, the results of blood tests are admissible when exclusion can not be shown. The Legislature must be deemed to have enacted the statute with due regard to the scientific facts regarding the probative value of blood grouping tests. An amendment was made in the statutes in 1936, which added Dom. Rel. Law §126-a, to cure the defect. It provided "Whenever such test is ordered and made, the results therof shall be receivable in evidence only where definite exclusion is established." In Matter of Estate Swahn, 158 Misc. 17, the court held §306-a of C.P.A. is applicable to a proceeding in the Surrogate's Court inasmuch as the language of the section indicates a legislative intent that the new species of evidence shall be made available in any litigation in any court of the State when its employment may throw light upon the issue. (Blood tests may be used in an action to annul a marriage, (Stillman v. Stillman, 240 N.Y. 268); in proceedings for non-support of mother and child, (Re Lantz, 283 N.Y. Supp. 799); litigations in Surrogates Court to determine the right to inherit property (Re Findlay, 253 N.Y. 1); in the criminal courts where the issue is raised (People v. Connell, 151 A.D.943).) Also, that the order would issue as to the mother and children since they were parties to the case, but that the father, not being a party, was not within the terms of the statute. From these cases it can be seen that the law in New York is that in all cases in which paternity is at issue, the courts, upon application, shall order only the parties to submit to the blood tests; and the results of such tests shall be admitted as evidence, - but only if an exclusion is shown.

A question is suggested by the case of Arais v. Kalensnikoff, 10 Cal.2d. 428 (1937). It was a paternity dispute in which the blood test showed that the defendant could not be the father of plaintiff's child. The plaintiff's evidence showed that the defendant had been seen at the mother's home at the birth of the child; that he bought groceries and clothing for the child, and that he had told various persons that the child was his. The judgment declared the defendant was the father. The defendant claims that the medical evidence is conclusive upon the question. The court, in holding otherwise, held, in effect, that when there is a conflict between scientific testimony and testimony as to the facts, the jury or the trial court determines the relative weight of the evidence, - parentage is not exclusively a subject for expert evidence. In other words, the negative evidence of non-paternity which is afforded by a blood grouping test of a supposed father's blood and that of the child and mother is not necessarily to be regarded as conclusive, but may be outweighed by circumstantial evidence strongly tending to indicate that he was, in fact, the child's father. The statutes of New York do not provide that the negative evidence of non-paternity shall be conclusive evidence. In effect, they state merely that, in case the blood tests result in exclusion, it may be received in evidence. However, I feel that the statutes should provide that exclusion be conclusive upon the court or jury. The tests have been known since 1924, their absolute validity and reliability is unquestioned by the members of the medical association. Decisions of the various courts throughout the United States have acknowledged the reliability and worth of these blood tests. The legislators of our State and others have also attested as to their validity by legislating their use in the courts. Having gone this far, I feel that they should go all the way and provide that exclusion as established by these tests shall be conclusive evidence so that circumstantial evidence, no matter how strong, cannot overcome it. Of course, the court must be satisfied that the tests were properly taken and resulted in a proper exclusion, but once it is so satisfied, I am of the opinion that the result should be conclusive upon the court or the jury. As the law now reads, however, the blood test report is merely an item that "may be received in evidence," and the trial proceeds, with the court giving the "proper weight to it."

The question as to the constitutionality of state statutes compelling parties to an action to submit to blood tests to determine the question of non-paternity has arisen. Mr. Wigmore states that the compulsion of a party to submit to blood tests involves the several privileges. (See Wigmore on Evidence, 3rd Ed.§§2216, 2220, 2265). In a case in New Jersey, - Bednarik v. Bednarik, 16 Atl. 2d 80 (N.J.Ch. 1940) - the husband sued the wife for a divorce upon the ground of adultery, alleging he was not the father of her child. He petitioned for a blood-group test of all the parties for the purpose of proving his non-parentage as authorized by the State statute (2 N. J. Stat. Ann. c 99 §2:99-4, Supp. 1940) which is very similar to our own. Petition was denied on the ground that to order such tests would violate the wife's privilege against self-incrimination. This decision appears contrary to the general weight of authority, however. The privilege against self-incrimination, as provided in New York Constitution Art. 1 §6, is quite generally held to embrace only actual testimony extorted and does not extend to real evidence such

as the body. The taking of fingerprints, forcible exhibition of the person, and comparison of footprints have been considered as non-violative of the privilege. The blood of a person is part of the body and ought to be considered as real evidence, and not as testimony, and thus, is not within the privilege. Also, the great majority of the courts recognize in themselves a power to compel an injured plaintiff to submit to a physical examination, including blood tests, with no invasion of the privilege. (See Hoyt v. Brewster, Gordon & Co., 199 A.D. 68; C.P.A. §206-a). The same should be held true in the case of blood-grouping tests to determine non-paternity. In New York, in Commissioner of Welfare v. Fagan, 259 A. D. 727, the question of the constitutionality of the blood test law has already been passed upon. By way of testing the law, the court by a divided vote denied a motion for a blood test, holding that the act was unconstitutional. Defendant appealed and filed a brief claiming that the law was constitutional. The Appellate Division First Department, unanimously reversed the lower court without opinion and directed that a blood test be taken, thereby upholding the constitutionality of the blood test statutes.

FRANK PETER LYERS, JR.

CONTRIBUTION AMONG JOINT TORTFEASORS

Measures have been introduced at the present session of the New York State Legislature which, if enacted, will change completely the present law in regard to contribution among joint tortfeasors. Because of the sweeping changes which this legislation would bring about, a review of the present state of the law will be valuable. It is necessary at the outset of this article to draw a distinction between actual and technical joint tortfeasors.

A person is a technical tortfeasor when his liability is predicated not on any active wrongdoing on his part, but solely upon his relationship to the actual wrongdoer. Such technical tortfeasors have always been allowed the right of contribution or indemnity from the actual tortfeasors, even at common law, and before the enactment of C.P.A. §193 Subd. 2, which expressly gives them such right. Thus under this rule, a general contractor engaged in paving a street was allowed to recover from a sub-contractor, through whose negligence the plaintiff's cellar had been flooded, the amount of damages the plaintiff had recovered from the general contractor. (Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214.) A municipal corporation was allowed to recover the amount of a judgment which it had paid to one who fell into an excavation, when it was proved that the accident occurred through the defendant corporation's negligence in building a bank vault. (Village of Port Jervis v. First National Bank, 96 N. Y. 550.) A master was allowed to recover from a servant the amount of a judgment recovered against him for damages caused by his servant's negligence. (Fadden v. Brooklyn Eastern Terminal, 204 A.D. 741.) A municipal corporation was allowed to recover the amount of a judgment for damages resulting from the negligence of defendant contractor in obstructing a street with a pile of rubbish. (City of Rochester v. Montgomery, 172 N.Y. 65.) The owner of an automobile liable under §59 of the Vehicle & Traffic Law was allowed to recover from the actual operator of such automobile, losses sustained by reason of a judgment obtained against the owner by one injured through the driver's negligence. (Shuler v. Whitmore, Rauber and Vicinus, 138 Misc. 814; Leonardi v. Bassett, 161 Misc. 324.)

This exception to the general rule in favor of technical joint tortfeasors is based on the theory that such a technical tortfeasor is not in pari delicto with the actual wrongdoer, his negligence being at the most, passive and secondary. Since in these cases any liability that such technical tortfeasors incur arises solely out of the actual wrongdoer's negligence, and since there would be no liability at all on their part but for the active wrongdoing of the defendant, under equitable principles contribution is allowed. The courts hold, under these circumstances, that the active wrongdoer stands in the relationship of an indemnitor to the technical or passive tortfeasor, for whatever damages the latter is held liable. (Dunn v. Uvalde Paving Corp., supra).

C.P.A. §193 Subd. 2 provides as follows: "Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court, on applica-

tion of such party, may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such judgment as may be proper."

This section is held to be specifically applicable in an action by a technical tortfeasor to recover contribution from an active wrongdoer. (Hailfinger v. Meyer, 215 A.D. 35; Fedden v. Brooklyn Eastern District Terminal, supra; Greenhouse v. Rochester Taxicab Co., 218 A.D. 224.)

Having disposed of the exception, we now come to the more difficult situation, where the parties are both actual wrongdoers, and are therefore in pari delicto with one another.

At common law no contribution was allowed between actual tortfeasors. This was on the theory that, since they were both guilty of affirmative wrongdoing, the courts would not adjust or determine the equities between them, but would leave them in the position in which their tortious acts had placed them. The equities being equal, a court of equity would not help one as against the other. (Peck v. Ellis, 2 Johns. Ch. 130; Weidman v. Sibley, 16 A.D. 616; Gilbert v. Finch, 173 N.Y. 463)

Subdivision 2 of §193 C.P.A., in and of itself, in no way changes the common law rule that no contribution can be had between actual tortfeasors. To bring a party in under this section, it must be shown that, if a judgment were obtained against the defendant, he would have an absolute right, existing as of the time of the application, to indemnification from the party sought to be brought in. This is not the case among joint tortfeasors, for there is no such right to indemnification or contribution at the time of the application, since such right exists only after a jury has rendered a joint judgment against both parties. (Greenhouse v. Rochester Taxicab Co., supra.) As the court said in the leading case of Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 308, "The third party not then a party must be liable to the defendant either wholly or in part for the claim made against the defendant in the action. Such is not the case among joint tortfeasors, unless either through indemnity or contribution or otherwise, existing at the time of application." Thus we see that the common law rule remained unaffected by C.P.A. §193 Subd. 2.

The common law rule was, of course, unjust in that it left to the whim of the plaintiff which of several joint tortfeasors he would choose to sue, or having obtained a judgment against two or more joint tortfeasors, against which of them he might choose to issue execution. It was to remedy the situation partially that the Legislature in 1928 passed §211-a of the C.P.A. (§714 of the Laws of 1928.) This section is in derogation of the common law and therefore is strictly construed. (Hadcock v. Wiggins, 147 Misc. 252.)

The section provides: "Where a money judgment has been recovered against two or more defendants in an action for a personal

injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."

It is apparent that §211-a of the C.P.A. confers a substantive right of contribution among joint tortfeasors where a joint judgment has been obtained against both of them. The question that arose immediately upon passage of this statute and which was not clearly expressed in any statute was: Does §211-a, read in conjunction with §193 Subd. 2, allow a defendant tortfeasor to bring into an action as a party defendant, another alleged tortfeasor for the purpose of obtaining contribution against him?

Some lower courts decided this question in the affirmative, others in the negative, and for a period of three or four years after the passage of §211-a there was considerable doubt as to its effect. The Court of Appeals, however, finally resolved the question in the negative in the leading case of Fox v. Western N.Y. Motor Lines, supra.

The facts in that case were, briefly: Plaintiff was injured when a truck owned and operated by one Harloff, in which he was riding, collided with defendant's bus. The defendant bus company made a motion to bring Harloff in as a party defendant. The trial court granted the motion, and Harloff was so brought in upon service of supplemental pleadings. The case was appealed to the Appellate Division, which sustained the ruling of the trial court on the motion, basing its decision on the case of Haines v. Bero Engineering Construction Co., 230 A.D. 332, which arose on a similar state of facts. The Court of Appeals reversed the decision of the Appellate Division and overruled the Haines case.

In so ruling, the court held that by its very words, §211-a is confined to those cases in which a judgment has been previously rendered against both defendants. In other words, a joint judgment is required before there can be any contribution under this section. The court argues that §211-a in no way changes §193 (2), for had the Legislature intended to allow one joint tortfeasor to bring in another for the purposes of obtaining contribution against him it would have amended §193(2). In enacting §211-a, the Legislature intended to remove only one defect in the common law rule, namely, to give the right of contribution where one tortfeasor had paid more than his pro rata share of a joint judgment.

The Fox case represents the law as it is at the present time. The rule of that case has been applied to many cases since. It has been followed many times on the same set of facts present in the Fox case, which is the usual set of facts in all these cases. A, riding

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with a friend, is injured when the friend's car collides with defendant's car. Either because of friendship or because of his driver's insolvency, A sues the other driver alone, who seeks to bring in the driver of the car in which A was riding, as a party defendant. Such motions have been denied on the basis of the Fox case, or in correct anticipation of the ruling of the Fox case, in Booth v. Carleton Co., 236 A.D. 296; Rothman v. Byron, 144 Misc. 770; Piratenskey v. Wallach, 162 Misc. 749; Rowe v. Denler, 135 Misc. 286; Troshow v. Altman & Co., 140 Misc. 420; Price v. Ryan, (infra).

It has also been applied where the shipper of chlorine gas in a tank car sought to bring in as a party defendant the owner of such tank car, De Marchi v. Elector Bleaching Gas Corp., 155 Misc. 143; where the owner of a building sought to bring in the contractor who built the building and the subcontractor who supplied the window frames in an action for wrongful death by the widow of a window cleaner who fell to death from an office building, Birchall v. Clemons Realty Co., 241 A.D. 286; where a contractor who was sued for his negligence in fitting pipes thereby flooding plaintiff's property with sewage, sought to join as a party defendant a municipal corporation, Ryhnders v. Green, 255 A.D. 401.

From the ruling in the Fox case, certain other results follow as natural and necessary corollaries. It was held in Price v. Ryan, 255 N.Y. 16, antedating the Fox case, that where on trial a verdict is rendered against one defendant tortfeasor, and at the same time exonerating a second defendant, the defendant held liable has no standing before the court to complain on appeal that the accident was caused by his co-defendant's negligence and not as the jury found, by his own tortious conduct.

The facts in the Price case were briefly as follows: Defendant Ryan rented trucks and drivers to defendant Dickison, a paving contractor. A drunken driver was ordered by Dickison's foreman to carry a load to a certain place, and in so doing the driver ran down plaintiff. A verdict was rendered against Ryan, and no cause of action was found against Dickison. The court held that Ryan had no right to appeal on the ground that Dickison's negligence was the sole and proximate cause of the accident. The result logically follows from the decision in the Fox case, since, if no right to contribution accrues until a joint judgment is rendered, then when a joint judgment is not rendered, the defendant found negligent would have no rights, as against his co-defendant exonerated from liability Since he has no rights against such co-defendant, he cannot deprive the plaintiff of his judgment by being heard to say that the jury found against himself alone, and that they should have likewise found against his co-defendant. To the same effect as the Price case, but presenting a much more adequate discussion, is the dictum in Rothman v. Byron, supra.

It is also a necessary corollary that a defendant tortfeasor has no cause to complain that the plaintiff settled with or discontinued as to a co-defendant without consulting him. As the court so aptly stated in Piratensky v. Wallach, supra, "It still remains within the complete control of a plaintiff to discontinue or settle with any one of them at any stage of the proceeding, without consulting other joint tortfeasors."

It is likewise held that where one defendant is allowed to withdraw from the case at the close of plaintiff's case, the ruling, even if error as to his co-defendant, cannot affect the paramount right of plaintiff to his judgment against the defendant, and thus such defendant cannot complain of any error in allowing such withdrawal. (Ward v. Iroquois Gas Co., 258 N.Y. 124.)

It should be noted in passing that the bar of §211-a as to the necessity of a joint judgment in no way affects the common law rule as to the right of contribution as to parties not in pari delicto, Birchall v. Clemons Realty Co., supra; Bonadonna v. City of Buffalo, 156 Misc. 225.

An interesting question arises out of this situation concerning whether one tortfeasor, upon having paid the full amount of the judgment with a check drawn from his insurance company is still entitled to recover contribution from another tortfeasor. In the case of Wold v. Grozalsky, 277 N.Y. 264, the court held that such right to contribution was in no way affected by the fact that one tortfeasor might pay more than his pro rata share with money given to him by his insurance company. His co-tortfeasor cannot complain that the insurance company and not the defendant seeking contribution is entitled to such contribution, and the fact that the insurance company would be subrogated to any amount so recovered does not deprive him of his right. In line with this decision is the case decided earlier of Adams v. Book, 244 A. D. 646.

The above decisions represent the present state of the law on the subject. It can be seen at a glance that the present provisions are unfair in that they do not give a defendant an adequate remedy as against a third party, against whom the plaintiff, through some whim, has sought not to bring suit, in that such defendant cannot join as a party defendant such third party.

The Court of Appeals hinted that a change in the present law would be welcomed, when in the Fox case, it said: "A plaintiff may now sue as many defendants as he pleases, whom he thinks liable in negligence for his damages. The Legislature has not yet given the same choice to the defendants to bring in other parties whom they think should be liable, either in place of, or jointly with those whom plaintiff has selected. However, if §193 is to be extended, it must be by the act of the Legislature and not by the fiat of the courts."

To the present writer, the existing requirement of a joint judgment as a condition precedent to contribution seems manifestly unfair. It is unfair in that it permits the plaintiff, rather than the court or the jury, to say which of the parties' negligence effectuated the plaintiff's injuries. Why should the plaintiff be allowed to say, "I think A's negligence caused my injuries, but that B is not at fault, and therefore I will sue A alone"? Why shouldn't the jury be allowed to determine which of the parties' tortious conduct brought about plaintiff's injuries? Yet, under the law as it is now, the jury is given no opportunity for such determination, since A would be refused the right to join B as a party defendant. Why should the liability of the various parties for damage to the plaintiff be determined by the prerogative of the plaintiff rather than by the judgment of his peers? Why should the defendant

be compelled to pay plaintiff's full damages, when a third party, whose tortious conduct might be equally well found to have caused plaintiff's injuries, is allowed to go free merely because of some whim or notion of the plaintiff as to the non-liability of such third party? Why shouldn't the defendant be allowed to bring into the action as a party defendant such third party for the purpose of determining the relative liabilities of the parties for plaintiff's injury, so that if the defendant so joined is likewise found to have been at fault, the original defendant may obtain contribution against him?

We have come a long way from the common law theory that there should be no contribution at all between joint tortfeasors in pari delicto. The Legislature, by its very act of enacting §211-a has allowed contribution among joint tortfeasors where a joint judgment exists, in total derogation of the common law theory. It can safely be stated that the common law theory no longer prevails, for §211-a in and of itself specifically overrules such theory, even though it does fail to give a defendant tortfeasor an adequate remedy. The common law theory having been discarded, why should the common law rule, which is based on that theory, still be applied in the absence of a joint judgment? Is it not high time that we went the whole way by abolishing the requirement of a joint judgment as a condition precedent to contribution among joint tortfeasors?

The Law Revision Commission, in its report to the Legislature on this subject (Legislative Document (1941) 65-a) has specifically recommended such a change. Companion measures in Assembly and Senate (S.Int. and Pr.31, A.Int. and Pr. 40)have been introduced in accordance with the request of the Commission. These measures contemplate amendment of §211-a of the C.P.A.; enactment of a new §211-b to the C.P.A.; amendment of §167 of the Insurance Law, and amendment of §§94-c and 94-k of the Vehicle & Traffic Law. There is not space to go into all the details of the proposed legislation. However, we shall quote Subd. 1 of the proposed §211-b of the C.P.A. which provides as follows:

"When any defendant in any action shows that some other person not then a party to the action may be liable for some injury to person or property, for the same death upon which the claim against such defendant in such action is based, the court on application of such defendant shall order such person to be brought in as a party to the action, so that the defendant's right to enforce contribution against such person may be determined."

It is hoped that the Legislature in the near future will find it convenient to enact either the aforementioned bills or other legislation giving a defendant tortfeasor an adequate remedy.

PHILIP HARRIS FEINBERG

SHOULD FOREIGN STATUTES OF LIMITATIONS APPLY HERE?

Before the year 1876 there was no question in our courts as to whether a foreign statute of limitations deserved recognition here in New York. The law was strict and simple. Limitation of time in which to bring an action is a matter of procedure. Therefore the law of the forum governed.

However, the definite ruling out by the bar of a foreign statute as a defense worked a hardship in some cases. This strict application of lex fori destroyed the whole purpose of any statute of limitations; namely, that after a certain length of time the peace and repose acquired by the defendant and the resultant stability through giving him an absolute defense would be of more value to the State than absolute justice from the plaintiff's viewpoint. The case of Liller v. Brenham, 68 N.Y. 83, is illustrative. This was an action on a judgment recovered in California against the defendant's testator 18 years before. Defendant's testator, having resided in California continuously until this action was brought, insisted that the California statute of limitations which barred an action on a judgment after five years, had extinguished the cause of action. The court said, "The fact that testator's residence was in California, makes no difference, and does not render the statute available to him or his representatives." This case clearly shows an unsound application of the law of the forum. Merely because he entered New York, the peace and repose guaranteed to the defendant by the California statute was shattered. The California statute was nullified by a New York court.

In 1876, the first version of what is now Civil Practice Act §55 was enacted. It provided that where defendant was a non-resident and the action was barred in the foreign state in which it accrued, it would be barred here. New York residents were excepted from the effect of this statute.

In 1902, what is now §13 of the Civil Practice Act was enacted. This applied specifically to non-resident plaintiffs who were forbidden to sue in our courts when the cause of action was barred at the place of accrual. By 1902, therefore, the rule of the law of the forum had been relaxed so that foreign defendants were not subject to harassment here. On the other hand, it was evident that a New York resident was to be given the benefit of the laws of his residence.

Then for an unknown reason the Legislature, in 1916, amended §390 of the Code of Civil Procedure into its present form as §55 of the Civil Practice Act and beclouded what appeared to be a sensible forward movement in the application of foreign statutes of limitations; for under §55, it makes no difference whether plaintiff is a resident or a non-resident. The foreign statute is a bar in an action against a non-resident, "provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this State for a like action, the limitation fixed by the laws of this State shall apply." This appears to give advantages to a non-resident plaintiff which he does not deserve.

Did our Legislature intend this? When a cause of action arises in New York State between non-resident parties they may sue in our courts. In such a case, which statute of limitations should apply, - the foreign statute or our own? There is little clue from the Legislature as to what they did intend in regard to this question of policy. If there is an expression of intent in §13 and §55 of the Civil Practice Act, it is well camouflaged behind loose wording.

Section 13 provides: "Where a cause of action arises outside this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this State."

Section 55 provides: "Where a cause of action, which does not involve the title to or possession of real property within the State accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this State for a like action, the limitation fixed by the laws of this State shall apply.

The courts have not expressed our policy because few cases have required a determination of it. In certain relationships there have been decisions. In other situations we must largely guess the results from our own interpretation of the statutes, aided by the clues that have been given by the courts.

A simplified approach to determine when foreign statutes of limitations should apply is to decide when we would expect them to apply. Then we may see whether the applications of §§13 and 55 coincide with our own reasoning. Wherever they do not, we may attempt to interpret. Wherever interpretation fails us, we may propose changes.

Before going further, it is well to note two established rules to be remembered when dealing with this question. First, these sections have no application to real property. Any question of title or possession of real property within the State is governed exclusively by the New York statute of limitations. Second, in applying either a New York or a foreign statute of limitations, the courts apply them in toto, including any tolling provisions.

Now we come to discuss what has been determined to be the law on this subject and what should be in the future. A New York resident, whether he be plaintiff or defendant, should have the benefit of New York Statute of Limitations. A non-resident plaintiff or defendant should not be given greater privilege than he receives in his home State. Statutes of limitations pertain to procedure and therefore in general the law of the forum should govern. A study of §§13 and 55 finds these rules supported in the main.

In Kirsch v. Lubin, 131 Misc. 700, aff'd 223 A.D. 826, aff'd 248 N.Y. 645, a non-resident plaintiff sued a non-resident defendant on a Canadian bond and mortgage made in Canada. The Canadian statute of limitations was 30 years. Ours was a six-years statute of limitations. We should not be expected to discard our statute for the longer foreign one.

The court so held. Although §13 which bars non-resident plaintiffs suing on a foreign-accrued cause of action when barred there, does not apply since the suit was not barred in Canada, the court said that what the section intended was not to substitute the foreign statute of limitations for ours but to impose an additional limitation. Since the defendant had entered and resided within New York for over six years, the New York Statute has run.

Lyers v. Credit Lyonnais, 259 N.Y. 399, was a similar case between non-residents on a cause of action which accrued abroad. This cause of action accrued in Russia. There was no statute of limitations there. The New York Statute was six years. But in this case the defendant could not plead the New York Statute as a defense because he had not been within the State for the six-year period. By §19 of the Civil Practice Act if a cause of action accrues when a person is without the State, the time does not begin to run until he returns.

The Civil Practice Act §13 relates to actions brought by non-residents. Where a cause of action arises outside this State, if the action is barred there it is barred here. This is reasonable. Non-residents should not be allowed to flood our courts with litigation merely because our statute of limitations is longer. Therefore if the plaintiff is a non-resident and the cause of action arose without this State, we need not apply §55. The foreign statute of limitations is applicable. It bars suit here.

When the cause of action accrues within this State, the situation is more troublesome. As to New York residents, either plaintiff or defendant, the statute of limitations of New York governs. This may not be obvious from the wording of §55, but it is the result of its application.

Section 55 makes no mention of New York defendants. Obviously they are not to be governed by any but the New York statute. A foreign plaintiff from New Jersey cannot claim his cause of action is alive because New Jersey allows him ten years to sue while New York allows only six. Section 55 applies to a non-resident defendant. Whether the plaintiff is a resident or not makes no difference The section provides that in suits against a non-resident, the plaintiff is barred if he is barred in the defendant's residence, provided that if the period of limitation there is shorter than the period in New York, the New York period governs.

A resident plaintiff barred from suit by a New Jersey two-year statute may sue here where our statute is four years. As held in National Surety Co. v. Ruffin, 242 N.Y. 413, where the Virginia statute was five years -which had run there- the defendant is still liable to suit in New York under our six-year statute, for the court said it was never intended to drive our residents into foreign state to make them bring actions there.

Thus far the courts have applied §55 as we should expect. The only difficulty arises when a non-resident is suing another non-resident. According to the statute, even though both were New Jersey residents and the New Jersey statute barred the action, if our New York statute was longer, suit could be maintained here. This is illogical. The only possible basis for this result is a broad application of the rule of the forum. Since the cause of action arose in New York, the statute of New York should apply under this rule.

This is where we quarrel with the statute. If it were possible to interpret §55 so as to bring a different result we would do so, but it cannot be done. Prior to 1902, §390 of the Code of Civil Procedure barred actions against non-residents when barred in their home state, "except by a resident of the State." In 1916, §390 was amended to bar actions against a non-resident debtor if barred in his residence unless the New York statute was longer, but more important, the exception in favor of a New York plaintiff was deleted. The only possible conclusion from this deletion is that a non-resident plaintiff is to be given the equal advantage that is granted a New York resident. There is no basis for such an advantage.

An illogical holding can result from §13 also. Assume that a New Jersey resident sues an Ohio resident on a cause of action arising in a third State. If there is a tolling provision in the statute of limitations there, the action is not barred. It can be maintained in New York 30 years later notwithstanding that it may have been barred in Ohio. It was never intended that our courts should be a haven to such plaintiffs.

The following chart illustrates the application of the statutes of limitations under the existing law:

	Plaintiff	Defendant	Cause arises	
1.	Resident	Resident	Within the State	
	§13 and §55 do not apply			(N.Y. Statute)
2.	Resident	Resident	Outside the State	
	§55 does not apply because defendant is a resident.			
	§13 does not apply because plaintiff is within the exception.			
				(N.Y.Statute)
3.	Resident	Non-resident	Within the State	
	§13 does not apply since Plaintiff is a resident			
	§55 does apply.			
	§19 tolls statute until defendant enters State.			(N.Y.Statute)
4.	Resident	Non-resident	Outside the State	
	§13 does not apply as plaintiff is a resident			
	§55 does apply.			
	§19 tolls statute until defendant enters State.			(N.Y.Statute)
5.	Non-resident	Resident	Within the State	
	§13 does not apply because action arose outside State			
	§55 does not apply since defendant is a resident			(N.Y.Statute)

6. Non-resident Resident Outside the State
§13 applies
§55 does not apply since defendant a resident (Foreign Statute unless N.Y. shorter)

7. Non-resident Non-resident Within the State
§13 does not apply
§55 applies (N. Y. Statute)

8. Non-resident Non-resident Outside the State
§13 applies
§55 applies (Foreign Statute)

To our mind, changes in both §13 and §55 would protect New York courts from the possibility of being burdened with foreign suitors and at the same time allow non-residents such opportunity to sue as is in keeping with comity between the States. Section 55 should be chanved back to its original form. In an action between non-residents, a bar in the defendant's residence should be a bar here, whether the cause of action accrued without the State or accrued within the State.

Section 13 at present may bar an action depending upon the place where the cause of action accrued. Why should the place of accrual govern? Persons ordinarily are not sued where the cause of action arose, but at their residence, for this is where they can be found. Therefore, the bar to suit here should be the bar of the residence of one of the parties, Next comes the question, whose residence - the plaintiff's or the defendant's? Assume that a New Jersey plaintiff sues an Ohio defendant. Under New Jersey law the statute of limitations is tolled until the Ohio resident returns. In Ohio, the statute has now run. New York must respect the laws of both States. If we say the New Jersey statute shall determine whether the action is barred here we are undermining any effect of the Ohio statute. If we recognize the Ohio statute we take away the effect of the New Jersey law. The solution to this dilemma is to go back to the purpose of a statute of limitations. That purpose is, to quiet lawsuits. Such a purpose operates in favor of the defendant. Therefore, a bar to suit in the residence of the defendant should bar maintenance of an action in New York courts. We are under no obligation to entertain actions by the New Jersey plaintiff. He has the alternative of suing in Ohio or hoping for the defendant's return into New Jersey and then suing.

Under §55, should we allow a non-resident to receive the benefit of a longer New York statute of limitations merely because the cause of action accrued here? There is no reason for it. When a New Jersey resident sues a fellow New Jersey resident, the statute of limitations, having run there, should preclude suit here.

If the cause of action accrues here but the plaintiff lives in New Jersey and the defendant in Ohio, why should the plaintiff have the benefit of our longer statute? We are under no duty to open our courts. He may go to Ohio within the time limited there or he may wait in New Jersey for the defendant to enter that State. Section 55 should be modified by striking out the option of a non-

resident plaintiff to sue a non-resident defendant in our courts when our statute of limitations is longer than that of defendant's residence.

Perhaps the best solution of all would be to wipe out §13 and §55 completely and substitute a statute similar to the following: "In an action against a non-resident, no matter where accruing, a bar by the statute of limitations of the defendant's residence shall bar an action in New York. This section shall in no way restrict a resident of this State."

With the adoption of such a rule we would have a definite policy in New York on the application of foreign statutes of limitations. They shall never restrict our residents. We would not encourage non-residents to use our courts. The defendant would obtain the peace and repose for which the statute of limitations was designed.

AUGUSTUS NASMITH

LIABILITY OF MASTER FOR SERVANT WHILE ACTING UNDER THE DIRECTION OF A POLICE OFFICER

The case of Balinovic v. Evening Star Newspaper Co., 113 Fed. (2d) 505 (App. D. C.), Cert. denied, 61 Sup. Ct. (1940), decides an interesting point of law. The question decided is an open one in the State of New York.

The facts, briefly, are as follows: Balinovic sued the Evening Star on the theory that its delivery truck, negligently driven by its driver, injured him in a collision. The question is whether the District Court was right in directing a verdict for the defendant because the driver had left his route and his work of delivering papers, and was chasing a traffic violator, at the command of a policeman who jumped on the runningboard and stayed there. The directed verdict was affirmed on the appeal to this court.

The majority based their decision on the ground that the servant had left the business of the master when he left his route and aided the police officer in chasing a traffic violator. The court said that the driver was "loaned" to the District of Columbia, and that the defendant was not responsible for his negligence. This is the so-called "lent servant" doctrine.

When B, for his own purposes, borrows, controls, and directs A's driver, B is responsible for the driver's negligence, and A is not. The court says that an express authorization from an employer to an employee to do another's work under another's direction does not make the employer responsible for the employee's negligence in doing the work. The master's responsibility cannot be extended beyond the limits of the master's work.

As to whose work is being done, the court uses the test as to who has the power to control and direct the servants in the performance of their work, as laid down by the United States Supreme Court in Standard Oil Co. v. Anderson, 212 U.S. 215.

The decision in the Balinovic case was not unanimous. The dissenting judge held that the defendant was liable. He said that the issue was not one of private consensual agency; that the plaintiff did not contend that the defendant consented in fact to the driver's criminal-chasing activities, but that a duty rested upon the defendant corporation, as upon an individual as part of its broad obligation as a corporate citizen of the community, to discharge a duty imposed by law, and that the driver was performing the duty of the absent corporation; and so he was not acting outside the scope of his employment. The dissenting judge based his decision in a large measure on the case of Matter of Babington v. Yellow Taxicab Corp., 250 N.Y. 14. The facts of the Babington case are as follows: Defendant was a taxicab corporation. One of its cabs and drivers was commandeered by a police officer to chase another car in order to arrest its occupant. During the chase, another car cut across its path. The result was a collision from which the cab driver's death ensued. The action was brought under the Workmen's Compensation Law to recover against the defendant for the driver's death. In af

firming a verdict for the plaintiff, the court said: "From the fact that Babington was in charge of the car at the request of the employer, the inference would follow, in the absence of evidence to the contrary, that he was in the performance of his duty at the time of the accident. We are to say whether that inference must be held to have been neutralized by evidence that he was chasing an escaping criminal by order of a policeman." The court then quoted §1848 of the Penal Code, which reads: "A person who after having been lawfully commanded to aid an officer in arresting a person, or in retaking any person who had escaped from legal custody, or in executing any legal process, wilfully neglects or refuses to aid such officer is guilty of a misdemeanor." The court continued: "In sending Babington upon the highway the defendant knew or is chargeable with the knowledge the man and car alike would have to answer the call. Insofar as the danger of pursuit was a danger incidental to the management of the car, it was one of the risks of employment, and incident of the employment, foreseeable, if not foreseen, and so covered by the statute. (Workmen's Compensation Law.) Babington was in charge of the cab, and could not desert it without peril to his master's interest. The fact that while protecting it for his master, he used it incidentally to preserve the public peace, was not such a departure from the course of duty to constitute an abandonment of the employment, even if it be assumed that the direction of the officer was not a binding order."

Judge Cardozo, in closing, says: "The question is not here whether the employer would be liable to third persons injured in the chase, and if so, to what extent. *** Conceivably the employee would be deemed to have passed out of the service of his general employer and into the service of a special one. We leave that question open, not meaning to express, even by intimation, an opinion as to the answer. The general employer is still liable under the provisions of the statute (Workmen's Compensation Law)."

In the Balinovic case, the court assumes that the police officer has the power so to commandeer. The power is expressly given by statute in New York (Penal Law §1848).

In speaking of the statute in the Babington case, Judge Cardozo says: "The duty goes back to the days of the hue and cry." He then relates that the people in early English days were bound to keep weapons and horses to fulfill the duty of the pursuit of felons. Judge Cardozo then says: "The horse has yielded to the motor car as an instrument of pursuit and flight. The ancient ordinance (Statute of Winchester) abides as an interpreter of present duty. Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the State, not faintly and with flagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." The writer presumes that §1848 of the Penal Code would allow an officer to commandeer a person to help him arrest a traffic violator, despite the fact that, by statute, a traffic violation is no longer a misdemeanor. In Berger v. City of New York, 260 A.D. 402, a police officer commandeered a car to chase fleeing suspects. In speaking of the commandeering, the court said: "It is conceded that the officer not only had the right to commandeer the car but that it was his duty to do so."

There is one other point that should be noted here. In the Balinovic case, the court expressly stated that the accident occurred June 23, 1933, before the passage by the District of Columbia of a statute which imposes liability on the owner of a car for the acts of any person who drives it with his consent, and the mere fact that the Evening Star Newspaper Company had entrusted its car to its driver did not make it liable. The statute spoken of is similar to §59 of New York Vehicle and Traffic Law; the latter reads: "Negligence of operator other than owner attributable to owner. Every owner of a motor vehicle operated upon a public highway shall be liable and responsible for death or injuries to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." What effect this would have made had the accident occurred after the passage of this Act will be discussed later in this article.

Before discussing what we think the answer should be in regard to the master's liability for his servant's tort while he is controlled by a police officer, there are two assumptions which we must make.

We must assume a case in which the plaintiff is not guilty of contributory negligence, and in which the defendant's servant is guilty of negligence. In the Babington case, the court, speaking through Judge Cardozo said: "Negligence would certainly be relative to the need and the occasion, a speed too great at other times is proper in emergencies." There are a few rules of law which should be stated, which will be helpful in arriving at an answer to the problem.

In Reilly v. Connable, 214 N.Y. 564, the court said: "The liability of an employer for the negligence of his employee proceeds from the maxim, qui facit per alium facit per se (he who acts through another acts himself)." In that case the plaintiff was suing the defendant master for injuries inflicted upon him by the defendant's servant. After laying down the above general rule, the court continued: "The fact that the automobile was the defendant's did not make him liable. *** The fact that the chauffeur caused the injuries during the period of his employment does not make the defendant liable. If the employee in doing any act breaks the connection between himself and his employer, the act done under those circumstances is not the act of the employer."

The basis of liability of a master for the acts of his servant is the power which the master has a right to exercise in controlling the servant in relation to all the details of the work.

In Wyllie v. Palmer, 137 N.Y. 248, the court, speaking through O'Brien, J., said: "The doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong, at the time and in respect to the very transaction out of which the injury arose.

"The very fact that the party, to whose wrongful or negligent

act an injury may be traced, was at the time in the general employment and pay of another person does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time and who had the right to control and direct his conduct."

The question is whose work was being done at the time? In Standard Oil Co. v. Anderson, 212 U.S. 215, the court said: "The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being done, a question which is usually answered by ascertaining who had the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger undertaking."

In our situation, wherein lies the power of control when the driver of the defendant's car is commandeered? The police officer has the power to commandeer, expressly given by statute. There is a duty upon the agent to obey the summons. His refusal would constitute a misdemeanor. It seems logical to say that the servant is now the servant of the municipality and is no longer acting for his master. Clearly the master has no control whatsoever over the servant, and the servant may well be held to have passed out of the employment of his master. It may be said that there is a duty upon the absent corporation to allow its car and servant to be used in such law enforcement. This is no doubt true, but it is quite another thing to say that the absent corporation should be liable for the negligence of such an a ent when he is acting under the direction and control of a police officer.

In Geary v. Stevenson, 169 Mass. 23, plaintiff brought an action for false imprisonment, he having been arrested by defendant's servant. There was some evidence that at the time, the servant was acting under the direction of a police officer. The court said: "There was evidence that for the time being he [servant] was acting under the direction of a police officer. This question was properly submitted to the jury. If he was so acting, then the general master would not be responsible for his acts."

In McCarthy v. McCabe, 131 A. D. 396, the plaintiff brought an action against the defendant to recover for the conversion of potatoes taken by George Wilson, a constable, under an execution. Wilson hired the team and drivers from the defendant who told the drivers that the constable would tell them what to do, and he gave them no other instructions. The court said that it appeared that all the acts of the drivers were done while assisting the constable in taking

possession of the property under his levy, and that they acted under the constable's direction and for his benefit and convenience. Continuing, the court said: "I think there was sufficient evidence to warrant the jury in finding that the defendant did not sustain the relation of master to the drivers so as to make him liable for their acts in assisting the constable."

In New Omaha Thompson-Huston Electric Light Co. v. Anderson, 73 Nebraska 84, the following facts appeared: Plaintiff's intestate was killed as a result of an electric shock received by him while lowering a ladder at a fire. The plaintiff alleged negligence on the part of the defendant's servants. An ordinance of the city provided: "That all corporations, companies and individuals owning and operating overhead wires shall in times of fire send one or more linemen to the scene of the fire, who shall report to the chief of the fire department or the City electrician, and they shall disconnect and remove any wire or cables which may become a menace to life or property." The defendant company sent a lineman to the fire and he said that a certain wire was dead. When the ladder was lowered, it touched the wire, and plaintiff's intestate was killed. The court held: "A lineman of the electric light company, while acting at fires under the direction of the city authorities in pursuance of an ordinance, cannot render the company liable by his words or acts in the absence of special authority."

A case somewhat similar to the Balenovic case is that of Bindert v. Elmhurst Taxi Corp., 168 Misc. 892. The facts are: Defendant is a corporation engaged in the business of operating taxicabs for hire. One of defendant's cabs, operated by defendant's driver, was hailed by another cab driver, Cohen, who stated that his [Cohen's] cab had been stolen. Cohen, jumping in, directed Whelan, defendant's servant, to pursue the stolen cab, which was still in sight. During the chase the plaintiff's car collided with the defendant's cab. Plaintiff sought to recover for the property damage sustained. Pette, J., said: "From the moment when defendant's chauffeur, Whelan, started with Cohen in pursuit of Cohen's stolen cab, the relationship of master and servant between defendant and Whelan terminated, and the resulting accident did not occur in the course of Whelan's employment. Whelan's duties to his employer were clear, i.e., to receive and transport passengers for hire; it was not a part of Whelan's duties to perform police functions in apprehending criminals or recovering stolen property with the use of the defendant's cab, without defendant's permission, express or implied. The factual situation presented herein does not create the inference that the accident arose at a time when an employee was acting within the scope of his employment However praiseworthy and charitable Whelan's object may have been in aiding a fellow worker in distress, nevertheless, when Cohen commandeered defendant's cab, Whelan abandoned pro tempore the relationship of master and servant."

Plaintiff's counsel in the above case cited to the court the Babington case. The judge distinguished between the two by pointing out that in the Babington case a police officer, having the power to commandeer, exercised that power and the cabdriver was bound to

obey, while in the case at bar the commandeering was done by another cabdriver and there was no such duty on the part of defendant's servant to obey that command. Since the question as to liability of the master to third persons injured was not present in the Babington case, it hardly seemed necessary to distinguish it.

Can a logical distinction be made so as to impose liability upon a master in situations such as the Babington case, for injuries to his servant, and yet hold that as to third persons there shall be no liability? In other words, is it necessarily inconsistent to hold that, for purposes of compensability to the servant, injuries arose out of and in the scope of the employment, and to hold that, for the purposes of tort liability, the servant was acting outside the scope of his employment? This writer thinks that such a distinction can logically be made, and should be made.

In Chicago I. & L. RR. Co. v. Clendennin, 81 Indiana Appeals 323, the court said: "An accident is said to arise out of the employment when there is a causal connection between it and the performance of some service of the employment; and this court had held that a causal relation is established when the accident is shown to have arisen out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into it, or when the evidence shows an incidental connection between the conditions under which the employee works and his resulting injury."

When a master places his servant in a car and puts him on the street, he is bound to know that the car might be commandeered. It follows logically that if the servant is injured in the ensuing chase, the master, by having placed him in this position, should be liable for the resulting injuries sustained by the servant. The servant, as for injuries to himself, is still within the scope of his employment. This is all that the Babington case holds. In other words, it is one of the risks of his employment to which the master has exposed him and, for the injuries arising therefrom, the master should be liable.

It should be remembered that the Workmen's Compensation Act was remedial in its nature and that it is given a liberal construction. The court said in Matter of Petrie, 215 N.Y. 335: "The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the Legislature as a wise public policy concerning injured employees."

In Rosmuth v. American Radiator Co., 201 A.D. 207, the court said: "The recent current of authority in this State and elsewhere has been to take a broad conception of the term 'employment' as

used in the Workmen's Compensation Law, not as confined merely to the nature of the work or the particular service of the individual claimant, but as reaching out and embracing all of the conditions, obligations, and incidents of the employment. It is not easy to harmonize all of the cases **** The question is, did the employment as such proximately contribute to a risk which is common to humanity? If so, there is liability. The weight of recent authorit is in favor of this broad interpretation of the statute which considers the employment as including its conditions, obligations and incidents and considers the perils reasonably to be expected therefrom as risks arising out of the employment."

The writer reaches the conclusion that the relationship of master and servant is broken insofar as tort liability on the part of the master is concerned when the servant is commandeered by the police officer, and that the master cannot be held on any agency theory.

The question then arises, would it be possible to place liability upon the master by virtue of §59 of the Vehicle and Traffic Law?

In Psota v. Long Island R.R.Co., 246 N.Y. 388, the court stated that prior to the enactment of this section the law was that an owner was not liable for the negligence of a person to whom he had loaned his car, whether that person was a member of his family, a servant on a personal errand, or a stranger. "The Legislature determined to change this law and did change it by this section of the Highway Law (now the Vehicle and Traffic Law) so as to make the owner liable for the negligence of a person to whom he loaned the car in connection with its operation upon the highway. Such a person was no longer a stranger to the owner, but became to this extent the owner's agent. The owner assumed this liability under the law and took this risk in loaning his car. But the Legislature went no further; it did not extend the liability of the master for the acts of his servant. It placed the borrower of a car in the same position towards the lender as that of master and servant, principal and agent, but it did not increase the liability of the lender beyond that of the master for those acts of his servant coming within the scope of his employment. The Legislature may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied."

In Cuba v. Turmelie, 168 Misc. 256, the Court said: "Under the decision of the Court of Appeals in Psota v. R.R.Co., 246 N.Y. 388, the statute relied on [Vehicle & Traffic Law §59] was held not to affect the liability of an employer for the negligence of his driver. That liability was held to depend on common law principles."

The writer fails to see any permission, express or implied, for the driver so to use the car. The permission to use is coextensive with the scope of the agent's employment. When the agent deviates or, as in this case, is taken- from the scope of his employment there is no longer any permission, express or implied, so to use the car.

The argument might be made that there is a statutory duty on the part of a person to answer a summons by an officer, and that a person may not loan his car to another without express directions that he, the borrower, is not to answer the summons of a police officer. This the writer will concede. Suppose you leave your car parked at the curb and the keys are in the car. The officer has the right to commandeer that car. He jumps in, during the chase he injures a pedestrian. Should it follow that you, the owner, will be liable in that case? Clearly not. Yet if we use the argument advanced above it might be said that there is an implied permission on your part for the officer so to use your car, because of §1848 of the Penal Law, and that with the implied permission, you, the owner, would be liable for the police officer's negligence. This would seem to be an extension of liability beyond the bounds of reason.

It is my conclusion that not only is there no liability on the part of the master on any agency theory, but that there is also no liability on the part of the master by any statute.

JOHN FREDERICK REILLY

ROSE v. DAILY MIRROR, INC. - LIBEL AND SLANDER

The case of Rose v. Daily Mirror, Inc., 284 N.Y. 335, decided December 31, 1940, presents an interesting aspect of the law of libel and slander. The rule of law laid down can be summed up in the first paragraph of the headnote, the text of which is: "A libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation." [Italics mine.]

The facts of the case are, briefly: The plaintiffs are the wife and children of one Jack Rose, deceased. The defendant newspaper published an article erroneously identifying the said Jack Rose with one "Baldy Jack Rose", who was described as a self-confessed murderer who had "lived in constant fear that emissaries of the underworld**** would catch up with him and execute gang vengeance." In the article, the respective plaintiffs were named as the surviving wife and children of the deceased Jack Rose, but there was no other direct reference to them. That the publication complained of was a libel on the memory of the deceased, presents no question; plaintiffs base no right of recovery for that wrong. Plaintiffs claim that the publication tended to impute to them in their own persons indignity, disgrace, and a lowering of their persons in the esteem of others, and that, therefore, the matter is libelous per se as to them.

The Special Term denied the defendant's motion for judgment dismissing the complaint. The order was reversed and the motion granted by the Appellate Division in a three-to-two decision, 259 App. Div. 928. The Court of Appeals has affirmed the judgment of the Appellate Division dismissing the complaint as not stating facts sufficient to constitute a cause of action. The decision was four-to-three.

As indicated above, the substance of the opinion of the Court of Appeals is that it is the law of this State that a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation. The tenor of the dissenting opinion is that mere failure to attribute personal fault or misconduct to a person does not render a publication any less libelous, if the publication does in fact expose the plaintiff to public scorn, scandal, disgrace, or obloquy. That this is a correct principle of law, the majority opinion does not deny, but bases its contention on the assertion that no direct reflection was made upon the character of the plaintiffs. It states, "It is thus quite plain to us that the complaint of these plaintiffs can be sustained only if we are prepared to construct a far-reaching extension of the law of libel as it has generally been understood in this State for many years. We are not persuaded that either justice or expedience dictates that we should do this."

To my mind, an examination of the authorities does not justify this conclusion. I believe that a holding to the contrary would not

only be more just but would be a correct application of the law of libel as it is generally understood throughout several States and in this State. That there is a controversy over this decision and the principle involved is indicated by a somewhat vigorous dissenting opinion in which it is recommended that the majority rule be changed by the Legislature.

The defendant relied heavily on Wellman v. Sun Printing & Publishing Ass'n, 66 Hun 331, and Sorensen v. Balaban, 11 App. Div.164. In the Sorensen case, plaintiff as mother of deceased infant daughter sued defendant doctor who had treated the daughter before death. Defendant told others that the daughter had died as the result of an abortion. Plaintiff sued to recover for injury to herself for maligning the memory of a deceased relative. The court denied plaintiff relief, but this case is clearly distinguishable from the one at bar. In the first place, the complaint was not framed, strictly speaking, as one for libel; but rather it set up a cause of action "for maligning the memory of a deceased relative." The court commented and the plaintiff admitted that there was no precedent for such a cause of action. The substance of the court's argument was that an action for libel or slander was not to punish the outrage or indignity to one's feelings, but to make redress of the injury to his repuration. An analogy was made to the case of one uttering defamatory language to the face of the one defamed merely, without any publication. The court in an offhand manner commented that the defendant's words in no way injured the plaintiff's reputation. However, this statement was made merely in support of the court's reasoning that no cause of action existed for "maligning the memory of a deceased relative." The statement was no part of the court's holding; it was dictum. That there can be no recovery for injury to feeling where there was no publication of the defamatory matter, is of course correct, but that is not the case at bar.

Plaintiffs in Rose v. Daily Mirror, Inc., attempt to distinguish the Sorensen case from the Rose case by the assertion that the defamatory words were spoken of the deceased alone, and not the plaintiff, while in the case at bar the plaintiffs' names appear in the publication in question. The court in denying the validity of this distinction, says, "****the plaintiff doubtless would still have suffered in an appreciable degree the loss of social standing and mortification of which they presently complain.' The minority opinion treats the distinction as valid. "It may be [asserts this opinion] if the names of the plaintiffs had been omitted from the publication, that they might still have suffered damage, but that is not the case before us."

In Wellman v. Sun Printing & Publishing Ass'n, 66 Hun 331, defendant published an article which stated in effect, "that plaintiff's deceased wife died under circumstances which aroused the suspicions of her husband, a lawyer, that she had caused her own death by procuring a miscarriage upon her person." A demurrer to the complaint was sustained. Admittedly, no valid distinction can be made between it and the case at bar, but it will be noted that the court's decision was very brief, and the question was not fully considered in the opinion. This holding undoubtedly added con-

siderable weight to the prevailing opinion in Rose v. Daily Mirror, Inc., but in the absence of a pronouncement upon the question by the Court of Appeals, the decision is in no sense binding, and no deep-rooted precedent would be destroyed by a decision to the contrary.

The plaintiff, on the other hand, relied heavily on Shelby v. Sun Printing & Publishing Ass'n, 38 Hun 474, aff'd on opinion below, 109 N.Y. 611. In that case, defendant published an article in which the plaintiff was characterized as an illegitimate person. The court commented that in the great majority of libel and slander cases the plaintiff was charged with some wrongful or disgraceful conduct or some act or omission involving moral turpitude, while in this case there was no such charge. "The statement is that she is illegitimate, a circumstance of which, of course, she could have no control, and for which she was personally in no way whatever responsible." However, the court was quick to point out that if the article subjects the injured to ridicule or disgrace, it is libelous whether or not there be a charge of wrongdoing.

It was said in Cropp v. Tilney, 3 Salk. 226, "Scandalous matter is not necessary to make a libel, it is enough if defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous;***."

In Burton v. Crowell Publishing Co., 82 Fed. (2d) 154, plaintiff, a widely known gentleman steeple-chaser, appeared in a paid advertisement. The photograph of him presented an optical illusion, which, when viewed in a certain light, became "grotesque, monstrous, and obscene." However, it was clearly an illusion, and it carried its correction on its face. The court was quick and emphatic in overruling the plaintiff's contention that the advertisement could be read to say that the plaintiff was deformed, or was engaged in an obscene performance, or that it asserted anything about him even by the remotest implication. Defendant contended that, since the correction was plain on the face of the picture, and since no person reasonable or unreasonable, could believe that plaintiff was performing any wrongful act or was deformed, it followed therefrom that there was no reflection on the plaintiff's character. In answer to this, the court pointed out that although there were few cases in the books in point, the publication might well be libelous; that an injury to character may be brought about by making a person appear ridiculous in the eyes of others as well as by attaching the stigma of bad moral qualities.

Said the court, "Such a caricature affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally, therefore, the injury falls within the accepted rubric; it exposes the sufferer to ridicule and contempt."

To my mind, the Burton case is directly in point with the case at bar. Can it be justly argued that the plaintiffs here who were described as the wife and children of "Baldy Jack Rose" would not

be subjected to ridicule and contempt in the eyes of their neighbors? At least a jury would be justified in so holding. It is necessary to bear in mind that holding one up to ridicule is enough to constitute a libel without an assertion of wrongdoing. This the Court of Appeals has held to be the law of this State. Plaintiffs here may well "****become known indefinitely as the absurd victims of this unhappy mischance."

If we engaged in the supposition that no one believes the publication, although the converse is certainly true, and if being married to a confessed murderer, or being his child, carries with it no stigma of moral turpitude or immorality, can it be said that the plaintiffs are subjected therefore to no ridicule? The plaintiffs were named in the article; their relationship to deceased was correctly described as a close one; to those who are friendly to plaintiffs and know the falsity of the publication, the plaintiffs are made to appear ridiculous. It will be recalled that in the Burton case the correction was on the face of the publication, and if anything was suggested, it was immediately dispelled. Yet, in both cases, plaintiffs are subjected to ridicule. On the other hand, a multitude of people certainly did believe the article, since there was no reason for them to question it. Scorn attaches to the plaintiffs because of such close association with a confessed murderer. At least the plaintiffs are placed in disrepute. When the truth is known, scorn disappears and ridicule is the lot of "***the absurd victims of this unhappy mischance." But where there is eithe scorn or ridicule, there is libel.

For the purposes of this discussion, it is not necessary to set forth a technically correct dictionary definition of libel. A libel is generally understood as a written publication exposing one to public hatred, contempt, scorn, or ridicule, or a lowering of one's reputation in the minds of others.

Approaching the question from this view, the distinction pointed out by the plaintiff between the case at bar and the Sorensen case becomes a valid one. Plaintiffs were mentioned in the case at bar, their connection with the "ridiculous" publicatior will remain in the minds of others. Since the plaintiffs may thus be associated with it for a long time, can it be argued that this is not ridicule? In the Sorensen case, since the plaintiff was not mentioned, the direct connection with the defamation which the Court of Appeals demands, was lacking.

Another case cited by the plaintiff is Merrill v. Post Publishing Co., 197 Mass. 185, 83 N.E. 419. In this case, defendant published a newspaper article concerning the arrest of plaintiff's sister for stealing from the postoffice of which plaintiff was the postmaster. The court refused to withdraw the case from the consideration of the jury. The reasoning of the court was parallel with that of the plaintiff in the case at bar; that, while the defamation did not touch upon plaintiff's character, it might well have affected his standing in his community. This court also distinguished the Sorensen case in that the statements there were spoken of the deceased person alone and not of the plaintiff. The

court said further that it remained to be seen whether or not one could have a cause of action for defamation where the plaintiff was not mentioned. Said the court, "We are of the opinion that it may be, although the case of Wellman v. Sun Printing & Publishing Ass'n, 66 Hun 331, seems to be a decision to the contrary."

The Restatement of the Law of Torts qdopts the rule that statements concerning dead persons may be defamatory as to a living person. See §560. Comment (e) of §564 reads:

> "Statements referring to one person but defaming another. A statement may be published of a third person under such circumstances as to be defamatory of another not named or described.
> "Illustrations:
> "5. A calls B a cuckold in the presence of C. A has defamed B's wife.
> "6. A states to B that C is an illegitimate child.
> "A has defamed C's mother."

Certainly there is sound reasoning behind the rule as applied by the dissent in the case at bar, and as recognized in other jurisdictions and adopted by the American Law Institute in the Restatement of the Law of Torts. Take the illustrations of §564, above. To say to a man that he is a cuckold is to call his wife an adulteress, just as surely as if the speaker had gone around to others and said flatly that she was an adulteress. Would the wife whose husband had been called a cuckold have a cause of action for defamation in New York State? I think the answer is yes. A broad field of non-liability would be opened up if the rule were otherwise. Any other ruling would enable the subtle writer to defame others by merely not mentioning their names.

The above illustration is clearly distinguishable from the case at bar, however. Wrongdoing was imputed to the wife, since certainly a reference is made to her by inference, even though she is not mentioned. The rule of the case at bar is that no direct connection was made to plaintiff, nor was there any charge of malfeasance. But does this distinction close the door to the danger of non-liability as enunciated above? I think not. The danger is clearly illustrated by Merrill v. Post Publishing Co., (supra), as well as the case at bar. When an article is written of a person describing him as a criminal, mentioning the plaintiff as a near relative, is the plaintiff not ridiculed in the mind of the reader? I do not mean to say that the reader will gather therefrom that plaintiff is a criminal, but I do say that he is ridiculed, and this follows merely from being associated with a false and ridiculous publication. The case at bar should have been decided on this theory. This result must follow if we keep in mind that a written publication is libelous if it holds one up to ridicule.

The majority opinion is of course not without merit. It is obvious that, if a deceased person is libeled, all his relatives cannot come running into court claiming a cause of action. An arbitrary limitation on liability could find some reasonable support,

but the court made no indication of such reasoning. Liability must cease somewhere, but I do not believe that it would be difficult to draw the line. It is for the jury to say whether or not the article was capable of defaming the plaintiffs. And following the general rule, if the facts admit of but one conclusion, it is a question of law for the court. However, the limitation on liability should not be fixed arbitrarily according to degrees of consanguinity or affinity. Each case should be looked at separately and decided on its own facts I believe that a jury in the case at bar would have been justified in finding that the plaintiffs had been defamed.

As to the justice of the court's decision, Finch, J., writing for the dissent, stated: "Plaintiffs are not the widow and children of Baldy Jack Rose, as alleged in the publication, and Jack Rose was not the despicable criminal whose shameful career was described. A respectable family whose husband and father has just passed away awakes the next morning to find blazoned forth in a morning newspaper that decedent was a notorious criminal, thus blackening the family and all its members. The slightest effort at verification would have shown the falsity of the story. If the law has reached the result of affording no relief here for the damage suffered, it would seem that the matter should be called to the attention of the Legislature. [Italics mine.]

It is not often that a dissenting judge will recommend that the rule of the prevailing opinion be changed by the Legislature. This seems to be a clear indication that the dissenting judges had in mind the danger that would flow from a policy of non-liability in cases similar to the one under discussion. The case at bar, however, in no way limits the rule of Shelby v. Sun Printing & Publishing Ass'n, (supra); in fact, the court adopts and approves the rule. It would seem, therefore, that the case at bar should not be authority for non-liability except in cases very similar to it. I agree with Finch, J., that justice requires the matter to be called to the attention of the Legislature.

EDGAR BLUMBERG

N O T E S

HOYT v. COUNTY OF BROOME - STATE EMPLOYEES AND THE SELECTIVE SERVICE ACT.- The prospects of all State and municipal employees' receiving full pay while engaged in military service under the Conscription Act were diminished by a decision handed down by Justice Deyo, Supreme Court, Broome County, February 27th, this year.

The case arose out of the following set of facts: On May 1, 1937, the plaintiff was appointed an investigator in the Department of Public Welfare at a monthly salary of $93.33. On June 26, 1938, he was duly commissioned a Second Lieutenant in the Officers Reserve Corps of the United States Army; and on September 1, 1940, was called into active service. Since that date the plaintiff has rendered no services to the County as relief investigator. Hoyt commenced this action to recover his salary for the month of September, 1940, pursuant to §245 of the Military Law, Subd. 1, which provides: "***During the absence of any such officer or employee (state or municipal) while engaged in the performance of ordered military or naval duty as a member of the National Guard or naval militia, or as a member of the reserve corps or force in the Federal military, naval or marine service," [such officer or employee] "shall receive his salary or compensation provided such absence does not exceed thirty days in any calendar year. If the period of such absence **** exceeds 30 days, he shall receive for the period in excess of 30 days such part of his salary***as equals the excess, if any, of such salary or compensation paid to him for the performance of such [military] duty."

The defendant moved at Special Term to dismiss the complaint on the ground that it failed to state a cause of action, alleging that §245 is unconstitutional as contravening Article VIII §1 of New York State Constitution which provides in part:

"No county, city, town, village or school district shall give or loan any money or property to or in aid of an individual;*** nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual*****."

It was alleged that §245 also contravened Subd.2, which provides in part: "No county, city, town, village or school district shall contract any indebtedness except for county, city, town, village or school district purposes, respectively."

In declaring §245 unconstitutional, the court distinguished the case of Henn v. City of Mount Vernon, 198 A.D. 152 (2d Dept, 1920). In that case a city employee, after his return from military service in 1920, sued for his accrued salary. The provisions in the Military Law and in the Constitution were virtually identical with the provisions existing at present. In upholding the statute in the Henn case, the Court laid great stress on the national emergency during the World War as justification for such legislation; also that the governor, mayor, etc., with the consent of military authorities, could recall any employee to his municipal or state employment, so that the employer-employee relation was not ended by the employee's induction into the armed forces.

In distinguishing this case, Justice Deyo asserted: "Today, though concededly the necessity for trained men is great, still we are not at war, and the emergency does not require war measures." The Court declared also that the Governor's right of recall was omitted from the present statute, thus "removing every vestige of the county's authority and completely destroying the relationship of employer and employee."

In support of his holding that such salary payments constituted a gift from the county to an individual, Justice Deyo cited two Court of Appeals decisions, both of which declared flatly that Federal military services is not a county or a State endeavor. (Matter of Bush, 159 N.Y. 212, and People v. Westchester County Nat'l Bank, 231 N.Y. 465.) Both of the cases cited dealt with proposed bonus payments by the State after World War I, and not with current pay of employees, as in the case at bar. Justice Deyo declared, "they [bonus payment decisions] are nonetheless instructive insofar as they determine that Federal service is not a state or county purpose."

He continued: "This court is not oblivious to the obligation due those who leave home and fireside to become versed in the art of war, but neither must it be oblivious to the mandates of the Constitution."

It will be interesting to find out how the higher courts dispose of this case. The logic of the decision might be swept away by a pronouncement that the present emergency is as dire as in 1917. Even assuming that the present situation is grave, should such a statute be upheld? Are State workers a privileged class? Why should they be entitled to more pay for doing the same work, as the average plumber, salesman, and lawyer draftee? Should taxpayers carry the burden of paying extra salaries to Government employees when other draftees must be content with $21 per month?

J. J. B.

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RUDMAN v. BANCHERI- MALPRACTICE AND THE STATUTE OF LIMITATIONS

In view of the fact that the lower court's holding in this case was considered in the last issue of the Albany Law Review, it may be of interest to examine briefly the Appellate Division's (Second Department) recent decision on appeal.

The complaint in this action alleged that defendant was a pharmacist duly licensed under the Laws of New York; that plaintiff requested defendant at his pharmacy to put up and sell to plaintiff a salve to reduce a swelling appearing on his hand; that defendant negligently, recklessly, and carelessly informed her that surgical treatment would be proper and that he was equipped so to treat her; that, relying upon this assurance, she submitted to surgical treat-

Lent by the defendant, who negligently, recklessly, carelessly, and without proper training therefor, equipment or qualification, applied an instrument at the location of the swelling, causing an incision to be made ****, which resulted in certain injuries. Action was commenced more than two but less than three years after the cause arose.

Defendant moved to dismiss the complaint on the ground that the gravamen of the action was malpractice and that the two-year Statute of Limitations governed. (C.P.A. §50 Subd.1.) The court held that negligence was the gravamen of the action and that the three-year Statute of Limitations governed. (C.P.A. §49 Subd.6.) The motion was denied. (Rudman v. Bancheri, 175 Misc. 415.) The Appellate Division, in a memorandum opinion, reversed on the law and granted the motion, one Justice dissenting. The Second Department held that this was an action to recover damages for malpractice, and, therefore, the two-year Statute of Limitations was a bar to the action. (Rudman v. Bancheri, 260 A.D. 957.) It will be noted that the criticism of the lower court's holding in the Albany Law Review (Vol. X No. 2, p.74), reached a similar conclusion on the same ground.

J. W. B.

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PEOPLE v. KOHLMEYER - ADMISSIBILITY OF RECORDS.- The Court of Appeals rendered a rather startling decision in a recent case concerning the admissibility of records under §374-a of the Civil Practice Act. This Section permits a writing or record made in the regular course of business to be received in evidence without the necessity of calling as witnesses all the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information. By virtue of this section hospital records have been introduced in evidence. Their use, however, has been restricted. In the case of Palmer v. John Hancock Life Ins. Co., 150 Misc. 669, they were allowed in evidence to show the date, entry, and discharge of a patient. Prior to People v. Kohlmeyer, 284 N.Y. 366, they were never allowed to show the opinion of a doctor or a nurse, since the right to cross-examine them as to the basis of their opinion would be denied the other litigant.

Let us examine some illustrations of this. In Matter of O'Grady, 254 A.D. 691, the court held that the records of the opinions of the doctors with reference to the disorders of the patient were erroneously admitted in evidence. The case of Stone v. Goodman, 241 A.D. 290, involved an action against a doctor for malpractice. The trial court, over the defendant's objection, admitted in evidence certain hospital records containing a diagnosis of the plaintiff. In reversing the judgment for the plaintiff, the Appellate Division pointed out, at page 297: "Our attention has also been called to serious error in the admission of evidence. The court admitted hospital records purporting to contain a diagno-

sis of the case, without showing by whom made or if made by a doctor or person competent to make such records, or to show that they were anything more than hearsay or information given by the patient or some unknown person. That was clearly error."

In the Kohlmeyer case, the court in a four-to-three decision, held that certain charts on which there appeared a diagnosis of the patient, the defendant, whose defense to a robbery charge was insanity, were admissible under §374-a of the C.P.A. The charts contained opinions of doctors of a midwestern hospital. The doctors were not called as witnesses but the charts were introduced instead, and were rejected by the lower court. On one of the charts, the defendant's type of insanity was described as "Cause Puerperal Form of Chronic Mania", and on the other, "Manic Depressive Psychosis, Depressed Phase." The prosecution, in its brief, put up a strong argument upholding the lower court's ruling in rejecting the records and stated in part: "Here neither the name nor the qualification of the diagnostician appear in the records. The opinion of the patient's ailment is merely made part of the history and with no indication that the person making the analysis was trained and competent in the field of mental diseases or at least, a doctor of medicine. If the authors of these opinions were alive and ready to testify, their evidence would not be admissible in the absence of any proof of their qualifications. The same should be true when their diagnosis has been recorded." (At page 41 of Respondent's Brief.)

The prosecution relied to a great extent on the two cases previously discussed - Stone v. Goodman, and Matter of O'Grady, but the court said "despite those cases we conclude that the diagnosis contained in the hospital records was admissible." [Italics, mine.] The court went on to say that it could find no difference between a recorded diagnosis of a physical condition and of a mental condition. The court felt that the hearsay statements of the patient as to the history of the case, which evidence the prosecution mentioned in its brief, should not be allowed in evidence. It is also apparent from the decision that the court felt that there was sufficient evidence in the hospital records concerning the competency of the doctors who made the reports.

It is true that the court's opinion in this case is contrary to the opinion of the Appellate Division Courts in the two cases mentioned previously, but will its opinion prejudice the prosecution or any litigant in cases which will arise in the future? The main argument against admitting these records in such cases as this is that it prevents the other party from cross-examining the person who makes out the record, and thus does not give the other party the opportunity of breaking down the testimony in the record Granting that to be true, there is nothing to prevent the other party from putting doctors on the stand to show a medical opinion different from that stated in the record and thus rebutting the recorded statements. That very thing was done in this case. How much weight is given to a record which contains only the written conclusions of a doctor as against the testimony of a doctor who takes the stand and testifies what his opinion is, and what he bases his opinion upon? A counselor who would base his case or

his defense solely upon records of this sort would be very indiscreet. Even in the Kohlmeyer case, there was other medical testimony by doctors who took the stand. Of course there are circumstances which make it impossible to call witnesses to testify. Very often it is inconvenient and expensive. In this case, the doctors lived in Wisconsin, and the defendant, incidentally, was a poor man. The purpose of §374-a, to eliminate the necessity of calling witnesses, together with the fact that the State could not be greatly prejudiced by the introduction of the records, is, in my mind, a justifiable basis for the decision.

J. A. S.

* * * *

GARDNER v. HOTEL ROOSEVELT - LIABILITY OF AN INNKEEPER.- On January 8, 1940, Shirley Booth Gardner went to a social function at the Hotel Roosevelt. She was wearing a fine mink coat, and upon reaching the mezzanine floor she was invited to leave this garment in the check-room provided by the Hotel. She was given a check. When she returned and presented this check at the end of the evening, the coat could not be found. Thereafter she sued for its value in City Court of New York. The judge refused to allow a defence of limitation of liability under §201 of the General Business Law, and directed a verdict for the plaintiff. The only question which he submitted to the jury concerned the value of the coat (Gardner v. Hotel Roosevelt, 24 N.Y.Supp.(2d) 261.)

While I am inclined to agree with the learned Judge Byrnes as to the non-applicability of the statute, I cannot agree that this was a case in which the Hotel was liable as an insurer irrespective of the question of negligence. If, on the evening in question, the plaintiff was a "visitor" rather than a "guest" of that Hotel, then the innkeeper would not be liable as an insurer and it would be error to direct a verdict without first determining the question of negligence on the part of the defendant. It is my opinion that she was a "visitor."

On the question of the applicability of §201 General Business Law, the decision is probably correct. The statute provides that the property must be deposited in a "parcel or check room" before the innkeeper can claim a limitation on gratuitous checking service. Here the facilities offered were merely movable racks set in the middle of the floor immediately in front of the elevators. Four stairways descended into this mezzanine, and many other rooms opened upon it. The racks were guarded only by tables on two sides, and empty racks on the others. This was scarcely the type of guarded and protected "room" intended by the Legislature. The question will become more difficult whenever situations are presented in which portions of smaller and more private rooms are used, or perhaps rooms with more than one door. Not all checking is carried on in small rooms used only for that one purpose, and interesting questions may arise as to the applicability of this statute in future cases.

The more interesting question here is the ruling that §201 G.B.L. does not apply. The defendant is liable absolutely as an insurer, without any discussion and decision as to negligence on his part. If the plaintiff is to be considered a "guest" in the legal sense of that word, the ruling of the judge is correct. If, on the other hand, the plaintiff was merely a "visitor" that evening, then the innkeeper would be liable only as an ordinary bailee. Insuch a capacity his liability would be tested by the degree of care which would be exercised by a reasonable man towards his own goods. In the latter event, after the plaintiff has presented a prima facie case by showing non-delivery, the burden of proceeding would be upon the defendant. In such circumstances he would be entitled to show freedom from negligence, or that the goods had been stolen, or that there had been a fire or an accident. On the other hand, if the defendant were held as an insurer, all that he would be permitted to show would be destruction by an act of God, by inevitable accident, or by a public enemy. It is important to the determination of the inkeeper's liability, whether the person was a "guest" or a "visitor", and I think that the plaintiff's designation here as a "guest" was erroneous.

It is not easy to resolve this question by reference to the New York cases in point. We can but follow the general rules that have been applied; and the fundamental idea upon which these rules are based is, that a "guest" must primarily be a traveler, a transient, one who is treated and received as a guest. Under the modern application of this idea, one can be a townsman and still be regarded as a transient going to an inn to accept accommodations for a more or less temporary stay. A guest must patronize the inn as such, to take the accommodations which it offers, such as lodging, food, and drink. In attempting to apply this fundamental idea, the decisions have gone both ways, some holding that persons who go to an inn merely to eat or to drink, are "guests", others that they are mere "visitors." One case held flatly that by stopping in an inn for a drink, the person became a "guest." In this instance - McDonald v. Edgerton, 5 Barb. 560 - he was a traveler upon the road. The court held, in Kopper v. Willis, 9 Daly 460, that a lawyer invited to dine with a guest became a guest also. The court limited the effect of the Kopper case, in the one immediately following - Gastenhofer v. Clair, 10 Daly 265, - pointing out that, where one person went to dine in an hotel at the invitation of a guest, he was not there with an intent to sojourn for even the briefest period and that he had therefore no intention of using it as a public house. He used it merely as a waiting-room or a writing-room. They asserted that it was not, how much the person ate or drank, but rather what motive he had in visiting the place. That was the test.

For purposes of discussion only, it would do no harm to admit that the modern rule is that travelers who go to an inn for food or drink are considered as guests of that hotel. The same rule does not necessarily apply to townspeople who are using the inn for the same purposes. If we apply the test of motive here, such persons would not be classed as "guests" although they came to eat and to drink.

To carry it further, it becomes evident that a patron who goes to an hotel merely for some social function, has no intention of making a "stay", however temporary, nor of using it as a public house. He goes there just as he would go to any ballroom not connected with an inn; or as he would go to an auditorium of the same separate character. He is not seeking accommodations in a public house and he is not a traveler in any sense of the word.

This position is not without support in case law. As far back as 1877, a local innkeeper sent out invitations to friends in the surrounding countryside asking them to come to a dance in celebration of the Fourth of July. A $2 charge covered both the dinner and the dancing, and the patrons bought refreshments on their own account. In discussing the loss of property of one of the friends, the court said that there could not possibly be an innkeeper-guest relationship in such an instance. While purchasing liquor and food in some circumstances would be considered sufficient, it is the status of the purchaser when buying, which controls. Here the innkeeper had invited a friend, who was not a traveler and who could not have insisted upon coming if he had not been invited. He was not a "guest." (Fitch v. Caster, 17 Hun 126.) Nor was plaintiff in Gardner v. Hotel Roosevelt a guest when she went to a social function in the hotel ballroom. She was not a traveler. She could not have insisted upon being admitted to the function as a matter of right.

In the past it was necessary to impose strict rules upon innkeepers to insure the lodging and the safety of the person and the property of a wayfarer in a country overrun with highway robbers. Even without such conditions we have carried over into our modern law many of the firm rules of those times. Our present-day innkeepers are not the suspicious characters that their predecessors were, but we still keep the strict rule of insurer liability once the relationship of innkeeper and guest is established. However, we should apply these rather harsh rules to the exact situations which they are intended to cover. An innkeeper should not be liable as an insurer unless the patron came with the intent and purpose of using the accommodations of a public house. This may present more difficult questions in cases where the patron comes to dine and drink, but when the patron comes merely to attend a social function there is no evidence of such a relationship, and the imposition of insurer liability is an injustice.

A.A.A., Jr.

* * * *

PEOPLE v. HINES - ADMISSIBILITY OF TESTIMONY OF WITNESS WHO COMMITTED SUICIDE.- The defendant here stood convicted of the crime of conspiracy, and twelve separate crimes of contriving, proposing or drawing a lottery, in connection with the "numbers" or "policy" game. The appellant's purpose in the organization was to protect, through his political connections, the higher-ups from arrest; to get a "co-operative" district attorney elected; and to see that the recalcitrant police officers were transferred to other precincts. The first trial resulted in a mistrial. (People v. Hines

168 Misc. 453.) The present appeal is taken from the second trial. (People v. Hines, 284 N.Y. 93.)

One Weinberg was one of the defendant's most active aids in the conspiracy. During the course of the first trial he gave testimony very damaging to the defendant and was subjected to an exhaustive cross-examination by the appellant's counsel. In the interim between the first and the second trials, however, he committed suicide. The defendant here contends that it was error for the trial court, on the second trial, to permit his testimony to be read in evidence, and also to refuse to permit any inquiry into the circumstances of his death.

The Code of Criminal Procedure §8(d) provides that "where the defendant has previously been tried upon an indictment or information embracing the same charge, the testimony of any witness who has testified upon such prior trial may be read in evidence upon any subsequent trial of the same indictment or information, upon its being satisfactorily shown to the court that the witness is dead or insane." This section would seem to defeat the appellant's first contention. He has already had his right of confrontation of the witness and has had an opportunity to cross-examine, and, having had this, it make no difference that the first case resulted in a mistrial.

The Court of Appeals also held that it was not error to refuse to permit inquiry into the circumstances of Weinberg's death. The Code of Criminal Procedure §9(d) provides, as a condition precedent to the reading of such former testimony, "that it be satisfactorily shown to the court that the witness is dead." This requirement was fully established.

The appellant was apparently of the opinion that the circumstances surrounding Weinberg's death were deliberatively relevant and should have been admissible in order to impeach his credibility. It is seemingly well established that a deceased witness, whose testimony on a former trial is admitted, may not be impeached by showing alleged contradictory or inconsistent statements or alleged declarations that the prior testimony was false. In Hubbard v. Briggs, 31 N.Y. 518, the defendant sought to put in evidence a deposition of a deceased witness for the purpose of contradicting former testimony which was read in evidence. The evidence was excluded on the sole ground that such evidence was improper unless the attention of the witness was first called to these statements. Obviously, since the witness was dead, the proper foundation could not be laid. Moreover, in Stacy v. Graham, 14 N.Y. 492, the defendant sought to introduce a direct declaration of the deceased witness, made after he had testified, that such testimony was false. The court excluded the evidence on the ground that the modification of the rule contended for by the defendant would inevitably result in a tampering with witnesses and would destroy the finality and safety of trials.

The circumstances attending Weinberg's death were held by the court to be inadmissible under this rule. Seemingly, the only question presented is one of relevancy and competency. I am in-

clined to agree with the court's conclusion in this instance. It is not hard for me to see that cases might conceivably arise in which the circumstances surrounding the death of a witness might have some deliberative relevancy and might have a tendency to impeach the testimony of the deceased witness. However, since it is necessary in any law proceeding to have a general rule, I am in agreement with the one established, for, in the majority of cases, such evidence would be highly prejudicial and therefore improper. It would be too easy for the defendant to unearth or even to manufacture statements of the deceased which were inconsistent with his testimony on the first trial. Furthermore, if such statements were admitted indiscriminately, with no opportunity for explanation or rebuttal, injustice rather than justice would result, in the majority of cases. A deceased witness is in no position to explain or deny, and the admission of evidence as to the circumstances surrounding his death would force the jury to speculate upon possible reasons for the suicide. Speculation is not the function of the jury, and when the day comes that we leave the credibility of our witnesses, dead or alive, to mere speculation on the part of "twelve good men and true", our courts will no longer dispense justice in any sense of the word. If we would have certainty in the trial of our cases and criminals, the circumstances surrounding the death of former witnesses must be excluded, as must any inconsistent statement allegedly made by them subsequent to the giving of their testimony. Otherwise, "justice" would be dispensed to the party employing the most ingenious or unscrupulous counsel.

E. A. T.

* * * *

SCOTT v. MILLER - PARTNERSHIPS AND EMPLOYERS INSURANCE.- The recent case of Scott v. Miller, 260 A.D. 428, illustrates a new trend in the application of partnership law to practical business purposes - that is, the use of a partnership organization to avoid the payment of employer's insurance under the Labor Law.

The employer, a painting contractor, entered into a contract with his former employees. It was entitled a partnership agreement. It provided that the employer, Scott, would furnish $5,000 for capital and that the other partners would contribute their time, skill, and influence to the partnership. No one of them was to be considered an employee, but when engaged in such work should be conducting it for and on behalf of the partnership. Scott was to be paid a definite salary of $5,000, and beyond that, all partners were to share profits and losses. The partners were to be allowed to draw advances in anticipation of their expected profits. These advances were specifically proportioned according to the time which each partner devoted to the business.

The partnership operated for sometime, until voluntary dissolution as provided by the original contract. Then the Industrial Commissioner demanded contributions on the profits each partner had drawn from the partnership. He claimed it was not a partnership but an employer-employee relationship.

At the hearing, the referee found that the above writing had not been entered into with any intention of its partnership features being honored. He found that no partnership existed. The Unemployment Insurance Appeal Board held, as a matter of law, that this agreement had failed to destroy their individual identity as employees and did not constitute a partnership.

On appeal to the Appellate Division, Third Department, the Court, by a four-to-one decision affirmed the decision of the appeal board. The prevailing opinion bases its decision wholly upon the holding of that tribunal that this agreement as a matter of law did not constitute a partnership. They cite the Partnership Law providing that sharing profits of a business is prima facie evidence that one is a partner but not "if such profits were received in payment as wages of an employee." Examination of the contract shows that advances on prospective profits are to be obtained by all partners except Scott, and these advances are proportionate to the time each partner devoted to business. The court suggests that these advances are merely daily wages. Scott, on the other hand, supplies capital and equipment and runs the business. These factors plus the $5,000 salary which Scott receives under the agreement, are consonant with his ownership and operation of an enterprise for profit for himself than of a profit-sharing partnership. As to losses, Scott was to bear them up to $5,000. The losses beyond that amount were to be shared by all the partners. It was pointed out that in a business of this size, profits or losses beyond $5,000 were very unlikely, and so the conclusion was drawn that the partners never anticipated sharing profits or losses, but rather were interested only in their wages.

An examination of the record of the lower boards of appeal discloses much to substantiate the dissenting opinion of Judge Heffernan, in which he maintains that this is a partnership.

"The referee found that the partnership agreement was not entered into in good favor nor with any intention of its partnership features being honored by any of the partners. There is not a scintilla of evidence in the record to sustain that finding. The appeal board found as a matter of law that no valid partnership came into existence. In her brief, respondent also asserts that as a matter of law the record demonstrates that Scott was an employer and not a partner of those associated with him. The record will be searched in vain for such proof. It is also asserted that Scott owned all the partnership assets. The proof is that he held title, not to the assets of the firm, but only to the property which he personally owned and contributed to the firm's use. The partnership assets were vested in the partners. Another finding of the appeal board wich is without justification in the proof, is that there was no accounting for profits or losses. The fact is that such an accounting was had which was satisfactory to the parties interested. Measuring the instrument before us by all the tests known to the law it clearly appears that it satisfies all the requirements for the formation of a valid partnership."

It can be seen that disposal of this case is upon the finding that no partnership existed. The prevailing and dissenting opinions

differ only upon the fact of a partnership and not upon the use of such to avoid the insurance contributions.

"Much is made of the fact, in Respondent's brief that on the hearing Scott admitted that the partnership was formed to avoid the Workmen's Compensation Law. There is no illegality in such an agreement. We have not yet arrived at the time when artisans, especially in a period of depression, may not band together in a joint enterprise for their common welfare to escape oppressive taxation without having their actions penalized."

There are numerous cases which substantiate this theory. The avoidance of legal liability has been the prime motive behind the growth of corporate organization in this country. It now appears that the partnership organization is being used more extensively as a means of avoiding the statutory obligations imposed upon employers.

In People v. Kaplan, 160 Misc. 179, a contractor, in demolishing certain premises, formed a partnership with his employees to share "in the obligations and profits" resulting from the enterprise. The contract was very similar to the one before the court here. The defendant readily admitted that the partnership was created to save the heavy expenses of compensation insurance. The court held that "while this plan of forming partnerships has become a habit of this particular defendant, there is not sufficient legal evidence to justify a holding that no partnership was in fact or in law created. Undoubtedly, the laborers consented to this arrangement in order to obtain employment. But all the facts, including the documentary evidence and the testimony of the laborers themselves, by which I must be guided, support the claim of a partnership rather than oppose. It therefore follows that even though the partnership was created to avoid the requirements of the Workmen's Compensation Law, no liability may be imposed if in truth and in fact a partnership was created."

In People v. Levine, 160 Misc. 181, which followed, the court reaffirmed the use of partnership organization for this purpose. But it found the evidence insufficient to substantiate the existence of a partnership.

It has often been held by our courts that a partner working for the partnership cannot be such an employee of himself as to come within the Workmen's Compensation Law. (Matter of Lyle v. Lyle Cider & Vinegar Co., 243 N.Y. 257.)

In Munter v. Exchange Mutual Insurance Co., 229 A.D. 56, the respondent was one of a group forming a corporation and was injured in the employ of the company before the new corporation was completely organized. The court held that this was a partnership, not a de facto corporation; that as a partner he could not receive compensation under the statute.

In these cases it can be seen that the partnerships were

formed to carry on small businesses of limited duration. Painting contracts and construction or wrecking projects were being performed; in which the small business man found employer's insurance too high for him to pay. Such a business man finds the corporation too expensive to organize and too cumbersome to operate. The partnership gives him greater freedom from statutory regulation than the corporation, and so he finds the partnership organization the most practical means by which to avoid employer's insurance contributions under the Labor Law.

J. E. D.

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REQUIREMENTS OF A FAIR HEARING BEFORE ADMINISTRATIVE AGENCIES

It is apparently the opinion of many of the writers of recent years on Administrative Law that the desire of various legislatures to render administrative procedure informal, or to "arrive at the essential justice of the matter", has been thwarted by a jealous judiciary. So much has been said about the red tape and technicalities which the courts use to sabotage administrative machinery, that we have tried to discover a few of the true facts, and to determine just how true these accusations are.

Apparently the field of Constitutional Law has been where the courts have done their most dastardly work. Instead of allowing trial examiners blithely to try the whole cause and condemn parties to death wholesale, some judges, "seduced by the sonority of their own pontifications" (see Gellhorn, Administrative Law, Cases and Comments), have been so bigoted as to demand that parties should have proper notice, counsel, the right to cross-examine, and to have definite findings made by the administrative agency.

We do not mean to exaggerate, nor to give the impression that these textwriters advocate the total elimination of judicial review or the common law rules of evidence and procedure. However, we do believe that the drift towards informality in administrative proceedings may completely wreck any efficiency which exists in our State and Federal Boards.

In the first place, it is futile to organize administrative agencies with a sole view to "essential justice." If the best minds from the time of Plato to William James could not find out what the phrase means, the chances that the Chairman of the Podunk Water Commission will do so are slim indeed. Everyone's idea of justice differs, and at least one party to every dispute usually leaves the courtroom with the firm conviction that he has been treated unfairly. It would seem far better to base substantive rules and procedure on a code which time has shown treats all parties with near, if not absolute, equality.

With the above point of view in mind, it might be well to consider the elements which Walter Gellhorn, in the book mentioned above, sets forth as the requisites of a fair hearing, and then discuss briefly what would result if these were disregarded in the futile search for true "justice."

Right to Appear by an Attorney

There is not much to be said as to the right of a litigant to have counsel in administrative as well as actual court proceedings. Nearly everybody concedes that this right is unquestionably essential to a fair hearing, and that withholding of the right is grounds for a new hearing. The dispute arises when we consider the qualifications of the attorney. Should he be a member of the State Bar? Should he have particular knowledge of the laws and machinery of the agency before which he is to practice?

In several cases (N.L.R.B. v. American Potash & Chemical Corp., 98 Fed. 2d 488; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 2d 940) it was held that a party could waive his right to have counsel, by his own fault. In the first instance, the trial examiner listened to testimony for an hour or more while one party had no counsel. The attorney in question was busy on another case and could not appear at the scheduled time. It was held that this did not constitute an unfair hearing. In the second case, counsel withdrew from the case because he was angry at several members of the commission, and his employer, having refused further to participate in the hearing, was not allowed to question the ultimate findings.

As regards the competency of persons other than duly qualified attorneys to appear before the agencies, we find the usual argument that procedure will be too formal if only attorneys are allowed to be present. The strongest advocates of the idea that attorneys be excluded and that laymen be allowed to practice are, not unnaturally, the administrators themselves. The fallacy of this proposition should be obvious. While attorneys are accused of being jealous and afraid that they will lose law business, the fact remains that they have had years of training in dealing with law and legal liability. If administrators feel that their cherished informality will be lost, they can set down rules for procedure to correct the evil. Moreover, the trial examiners or boards can run the hearing as they see fit. Nothing could be more dangerous, to our view, than to allow any unscrupulous layman to make a brief review of the laws under which a particular board is constituted, and then hold himself out to the public as qualified to represent any and every party who may be seeking "justice."

The Right to Have Testimony Under Oath

The only argument we have seen against requiring all testimony to be taken under oath is based on the proposition that nearly all witnesses lie anyway, and that therefore the oath is a useless formality. There is no possible way of ascertaining how much actual perjury takes place in the courts, but we have not yet reached a state of cynicism which makes us believe that all value of the oath is lost. Whatever a person's religious beliefs may be, the average person feels that he owes it to himself to tell the truth when he has sworn to do so. Certainly the requirement of an oath would not increase the incidence of perjury, and if it constrains a single witness to be more accurate in his statements, it is worth keeping in the administrative set-up.

Compulsory Process to Procure Testimony

There is but one case in New York that has held that a party is entitled to subpoenas as a matter of right. (Coney Island Dairy Products Corp. v. Baldwin, 243 A.D. 178). This apparently is against the weight of authority. Nearly every Federal and State agency reserves the right to exercise its discretion as to whether or not a party is entitled to subpoenas in a particular case.

The only possible argument against the compulsory issuance of a subpoena is that administrative boards might make nuisances of themselves, by issuing mandates in every case that arose. It would seem, however, that in the majority of cases, witnesses would be only too glad to testify. Usually the only witnesses before an administrative board are those who have a real interest in the decision. In the comparatively rare instance where a person refuses to testify, a party should have the absolute right to compel him to do so. This is not a serious problem, however, for every board exercises its discretion as to whether or not process should issue, and every board has the right to bring a witness into court.

Opportunity to Rebut or Cross-Examine

It would seem that the chance to cross-examine a witness is the most fundamental of any rights involved in a fair hearing. It is no argument that many determinations of fact, in legal proceedings and elsewhere, are made without a cross-examination, or that officials act every day on the assumption that information obtained through hearsay is accurate. The right to cross-examine is of the utmost importance, especially since most agencies tend to use material not formally in the record.

The best way to correct this tendency, or to offset its effects, is to establish the rule that a board must give the parties notice that specified material, not in the record, is to be used. The findings should include a statement of what data was used in their compilation, and the litigant should have a rehearing on the sole issue of whether the data were properly included, before he is compelled to go up on appeal. This would not only decrease the number of appeals, but would compel administrators to make their findings more specific. It should also be noted here that litigants should always be sure their objections are on the record, since under the modern practice, data not in the record is included in the decision.

The error in allowing evidence to come before the boards, of such a character that parties can not dispute it or weaken its efficacy on cross-examination, is particularly apparent in cases where the agency acts as investigator, prosecutor, and judge. We do not mean to suggest that governmental units would "railroad" a party; however, there must certainly be a strong inclination to accept the facts stated by the investigating division of a department as true. Any prejudice a governmental official might bear toward a litigant might easily have considerable weight in the final findings, yet the litigant would never have an opportunity to question them. Indeed, it would be doubtful that he would even know the prejudices existed! One Federal department was naive enough to suggest that it had overcome the possibility of any such occurrence by placing its investigating department in a different building from that of its trial examining division.

Many agencies have been inconsistent to the point of unfairness, in that they deny a party the right to cross-examine on

certain documents originating within the department, which admittedly bear weight when the findings are made, on the ground that they are "confidential." However, they have followed the general common law rule in that they accept evidence produced at a hearing, and not contradicted by the opposing party, or unreasonable in itself, as constituting a prima facie case. No administrator has ever explained how a party may contradict or question the logic of testimony or evidence he is never allowed to hear.

Since the functions of administrative bodies and law courts are substantially the same, i.e., to find out the true facts and compel the parties to act in accordance with the findings, we can not see why the agencies should be allowed to use any methods of determining the truth forbidden to the courts. This is looked upon today as the ultra-conservative point of view, but if the minutes of some of our Federal and State hearings are a fair sample, a little conservatism would not do our administrators any harm. We compel our judiciary to limit their recognition of facts not in evidence to those within common knowledge. Why should we permit administrators to use knowledge of facts, obtained in unrelated proceedings or elsewhere, in arriving at a final determination? Certainly counsel for the litigants has no way of discovering whether the trial examiner gleaned his facts from official reports or from the corner bar.

Who Must Hear and Who Must Decide?

The problem of bias on the part of administrative agencies is found most frequently in cases where a board has been asked to disqualify a particular member or officer from hearing a case, because of his prejudice. The cases vary greatly as to what may constitute such bias. In Montana Power Co. v. Public Service Commission, 12 Fed.Supp. 946, it was held that the statements of a commissioner made prior to his election to a board, to the effect that he disagreed with the point of view of a party to the proceeding in question, did not constitute bias. If it did so, no person could become a member of a board unless he were absolutely ignorant of its functions. In other cases, as where the chairman of a board was accused of accepting bribes by a petitioner and afterward sat on the case, (N.R.Ass'n v. Kiernan, 59 R.I. 90); or where the chairman of a liquor licensing board protested against granting of an application because he lived next door to the proposed saloon, and the board being evenly divided, cast his vote in favor of reviewing the permit on appeal, it has been held that there was bias and the determinations were invalid.

Certainly where personal prejudice can be shown, the affected commissioner has no right to sit at the hearing. To bar him from the proceedings is not a personal reflection upon his integrity While attorneys may question the fact on occasion, most administrators are human. Being human, they will either unconsciously allow prejudice to sway them against a party, or they will bend over backward and treat him unfairly because they fear they may be accused of favoritism.

Many persons have been heard to complain because the same person or board who heard the case does not always decide it. This is doubtless an undesirable condition, but at the present stage of development of administrative law, it is an inevitable one. There is too much work to be done; administrators are continually on the move, and some of the work must be delegated to subordinates. The only danger is that no individual or group exists upon whom the responsibility for a decision can be placed. There are many people who can be trained to extract the relevant facts from voluminous minutes and present them in intelligible form to the real administrators. As long as the process is not reversed, with the administrators taking the evidence and the subordinates making the decisions, no one may be justified in objecting to the delegation of these minor duties.

Volumes could be written on any one of the topics we have mentioned. We have only touched on some of the more important elements of a fair hearing, with the hope that the field of administrative law is a rapidly-growing one, in both size and importance, and that the treatment we receive before the various boards and agencies is entirely up to us.

GROVER NELSON NORTH

SECURITIES EXCHANGE COMMISSION

The Federal Securities Act, signed on May 27, 1933, became effective on July 27, 1933. It was administered by a specially created division of the Federal Trade Commission until September 1, 1934, when its administration was transferred to the Securities and Exchange Commission, created by the Securities Exchange Act of 1934, to administer both the Securities Act and the Securities Exchange Act. The Public Utility Act of 1935 is also administered by the Commission. Only the first of these laws - the Securities Act of 1933 - will be considered in this paper.

The purpose of the Securities Act is "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent fraud in the sale thereof." Public offering of a new issue must be preceded by registration of the issue with the Securities Exchange Commission. The purpose of this registration is to determine whether the registrant has disclosed the information necessary for intelligent judgment of its value by the investing public. Issuers who are unable to meet the requirements are prohibited from offering new issues to the public. Investors are accorded the right of action against issuers in case of misrepresentation, and persons found guilty of wilful violation of the Act are subject to criminal penalties provided by law.

The Securities Act requires that a registration statement be filed in triplicate to cover public offers of new issues of securities, and that at least one copy of the statement be signed by the issuer, by its principal executive, financial, and accounting officers, and by a majority of the board of directors. The registration fee is one one-hundredth of one percent of the maximum aggregate offering price, but not less than $25.00.

The information to be filed is set forth in detail in Schedule A for issues of domestic companies. The registrant must disclose the following relevant facts: Information concerning the character scope, and organization of the business; a description of the financial structure; descriptions of the more important underlying commitments, including management and service contracts, profit-sharing arrangements, patents, and other material contracts; the identity of promoters, directors, principal officers, dominant stockholders, underwriters, and counsel passing on the issue, and their interests in the company; and the remuneration paid to directors and officers in excess of $25,000. Other information concerns the proposed new issue and includes the following material facts: the proposed offering price, estimated proceeds, and the purposes for which the new money is to be used; options already outstanding and to be created in connection with the new issue, and the names of persons who will receive more than 10% of these options; the commissions of the underwriters, compensation of promoters, and other expenses to be incurred in selling the security; the particulars of any property to be acquired with the proceeds of the issue, and the interest of officers, directors, and dominant stockholders in the property. Finally, the issuer must file financial statements

including a balance sheet and a profit and loss statement, in such detail and form as is prescribed by the Commission.

Registration statements are sent to the Registration Division for examination. Usually, an examining group is composed of an accountant, an attorney, and several examiners, headed by an analyst. However, if the statement contains subject matter of a technical nature, the group is enlarged by adding other experts possessing the necessary training and experience to examine the particular data and information. If the examination has not disclosed any deficiencies in the statement, the new securities may be offered to the public 20 days after the filing date. This is the "waiting" or "cooling" period. If the statement contains false or misleading statements of material facts, the Commission has authority to issue an order refusing to permit the statement to become effective, or an order suspending the effectiveness of a statement. In deciding whether a stop-order should be issued, the Commission has authority to examine books and papers of the registrant, and witnesses, and may demand certified copies of the income statement and balance sheet of the issuer.

The Commission, to deal with persons filing statements found unsatisfactory but which appeared to have been honestly prepared, adopted the administrative practice of sending a "deficiency letter", in the belief that the registrant who desired to disclose all the material facts necessary to make the statement complete would amend it along the lines suggested by the Commission. Both the refusal-order and the deficiency letter are used to notify the registrant that a statement cannot become effective unless certain deficiencies are removed. The former is used when there is reason to believe that the registrant has wilfully violated the law; the latter, when there is reason to believe that he has honestly tried to comply with the registration requirements.

Since the Act does not say anything concerning the right of the registrant to withdraw a statement, before or after the effective date, the Commission adopted a rule to the effect that it would consent to the withdrawal of a statement when the withdrawal was not detrimental to the public interest or to the protection of investors.

Subsequently the rule was contested by a registrant, J. Edwar Jones, who had been refused the right to withdraw a registration statement before the effective date. The Supreme Court ruled that the Commission had exceeded its delegated powers in denying the registrant the right to withdraw his statement during the waiting period. (Jones v. S.E.C., 299 U.S. 581.)

The Jones case established the right to the registrant to withdraw a statement prior to the effective date. However, the Commission has ruled that a registrant must secure its consent to withdraw an effective statement and that such permission will be given only when it is consistent with the public interest and the protection of investors. In denying the right of the Boston Montana Mines Corporation to withdraw its statement, which had been effective more than two years, the Commission held that "the

right to withdraw, as established in the Jones case, ceases upon effectiveness of his registration statement, at least when, as in this case, the effectiveness of the registration statement is coupled with sales of securities thereunder."

Should the rule of the Commission be again contested, it appears that the Court would have to rule that an effective statement cannot be withdrawn without the Commission's approval, especially if part of the registered issue has been sold. The reasoning in the Jones case supports this view. However, the Court might uphold the right of withdrawal if no sales have occurred, on the ground that withdrawal at the stage is of no concern to anyone except the registrant.

At this point it should be noted that not all types of securities are required to be registered. The following exemptions are enumerated in §3 of the original Act: (a) securities disposed of, or offered to, the public prior to 60 days after the enactment of the law; (b) all Government securities and those issued by Government corporations, by National and State Banks, and by other instrumentalities created and controlled or supervised by a governmental unit; (c) commercial paper having a maturity of not more than nine months; (d) securities of non-profit-making corporations; (e) issues of building and loan associations, and similar institutions, whose business is confined to making loans to members, if the registration fee does not exceed 3% of the face value of the security; (f) security issues of common carriers subject to the jurisdiction of the Interstate Commerce Commission; (g) the certificates issued by a receiver or trustee in bankruptcy, with approval of the court; and (h) insurance policies and contracts now regulated by a State or a Federal agency.

The exemption privilege was extended by the 1934 amendments to several other types of issues. They are: (i) securities exchanged by the issuer with its existing security-holders exclusively, where no commission is charged for soliciting the exchange; (j) securities issued in exchange for bona fide outstanding securities if the conditions of the issuance and exchange are approved by a court or governmental authority; and (k) securities sold exclusively within a certain state, by an issuer who is resident of, or is incorporated in and doing business within, that state.

For most exempt issues, a prospectus is not required to be filed or offered to the buyer. The Commission requires that a brief prospectus be used in connection with the sale of exempt issues of certificates of deposit, securities exchanged for outstanding securities or claims, and voting trust certificates. However, it is not necessary to file a copy of the prospectus.

New issues of securities need not be registered if they do not involve any public offering. The Commission has ruled on numerous occasions that an offering of securities to a relatively small number of persons, - approximately 25 as a limit - is a private offering. Although no hard-and-fast rule can be laid down to distinguish between private and public offerings, the Commission

has taken the position that "what constitutes a public offering is essentially a question of fact, in which all surrounding circumstances are of vital importance; that in no case do the decisions depend exclusively upon the number of prospective offerees." Factors to be considered are: (a) the number of offerees and their relationship to each other and to the issuer; (b) the number of units offered; (c) the size of the offering; (d) the manner of the offering.

Registration statements do not circulate widely. Because of their size and cost and the inability of the average investor to analyze an issue by examining such a comprehensive document, the essential information is made available to the mass of investors through the prospectus. Registration statements are requested by persons or agencies desiring exhaustive studies, such as statistical services, investment-banking houses, and investment counsel, banks and insurance companies, and corporations seeking to invest surplus funds.

The problem of supplying the mass of investors with information about a complicated subject in a simplified and comprehensible form was solved by the use of a prospectus. The prospectus is expressed in condensed form and need not follow the numerical order of the items in the registration statement. Though the issuer is allowed to omit certain parts of the registration certificate, every prospectus must state that omitted information may be obtained from the Commission.

Issues registered with the Commission may not be offered to the public until the effective date, which may be the twentieth day after the statement was filed, or a later date, set by the Commission, if important amendments are filed. From the standpoint of effective administration, the 20-day waiting period is desirable - in fact, essential - in order that the Commission may have sufficient time to make a proper examination of the statement. It is important, also, in that it is a means of fulfilling the purpose of the Act, namely, wide dissemination of information concerning a new issue. This can be accomplished to a very considerable extent by making the registration statement a public document at the time of filing, thereby enabling the investing public to study the issue during the waiting period before it is offered for sale.

A relatively small number of the securities registered have failed to meet the registration requirements. A few typical cases will illustrate that the Commission, when it issues an order suspending the effectiveness of a particular statement or refuses to permit a statement to become effective, does not act in an arbitrary manner or base its decision upon technicalities. In one case, the Commission required the sponsor of an investment trust, who had registered an issue of investment contracts, to disclose in an amended prospectus that his previous experience had been disastrous to investors.

Frequently companies misrepresent their financial condition. This practice has been the principal reason for suspending many statements, and an important factor in virtually all stop-order

proceedings. In the Haddam Distillers Corporation case, the company was not allowed to sell $250,000 of stock because it attributed false and misleading values to many of the tangible properties. Permission to sell the issue was obtained after the balance sheet valuation of these assets was reduced 50%.

Proceedings arising under the Securities Law have usually resulted from suits in equity initiated by the Commission to enjoin violation of §§5 and 17 which require registration of securities. Information of fraudulent and illegal activities in violation of the law is obtained from many sources,-from the public, from state securities commissions, state and Federal officials, and from examination of registration, statements, and observation of trading activities. The growing efficiency of this administrative board is manifested by the following statistics: During the fiscal year ending June, 1936, the Commission handled 15,000 complaints. Of these only 4,038 were docketed for investigation, the rest being disposed of by correspondence. Formal investigation was necessary in only 345 cases, informal investigation being sufficient in the remaining 3,693 cases; and at the end of the fiscal year, out of the original 15,000 cases only 1,174 were still pending and not decided.

In conducting the 160 formal investigations, the Commission held hearings, summoned witnesses, required the production of books, papers, documents, and other relevant material, and, on the basis of the evidence obtained, took appropriate action.

The Act also provides for a personal liability of the issuer for the issuance of a false registration. The liability of the issuer is absolute, but all other persons may escape liability by proving that after reasonable investigation they had grounds for believing and did believe that the statements were not misleading. The standard of care required of such persons is that of a prudent man in the management of his own property. The Act, §24, declares the wilful making of false and misleading statements to be a crime and punishable as such. Comparatively few cases have arisen under the civil or criminal liability provisions.

The aim of Federal regulation of security issues is the achievement of truthful disclosure and wide dissemination of business and financial information by companies offering new issue to the public. Disclosure is achieved by requiring that new issue be registered with the Securities and Exchange Commission. Adequate publicity is achieved by requiring that a prospectus (or a registration statement) be given the investor to enable him to judge values intelligently. The present study has attempted to examine the law in the light of what has been done to encourage and compel disclosure and to prevent misrepresentation and fraud. The question of whether the investor is adequately protected by the requirement of publicity has not been considered.

Considerable progress has already been made in developing and perfecting registration methods and requirements. A series of forms was adopted that took into consideration the dissimilarities

and peculiarities of different classes of issuers and types of securities, and these forms are constantly being improved through simplification by the development of precision in requirements and by reducing the contents of the statement through elimination of material that formerly was considered essential. The major forms are being subdivided in order to provide special forms for companies engaged in particular types of business and for concerns in various stages of development. In addition, a series of new forms is being developed to replace those in use for certificates of deposit and for securities issued in process of reorganization, and additional forms for electric and gas utilities, investment contracts, and foreign national and municipal governments. Simplification of the rules and regulations governing registration will facilitate the administrative control in becoming more effective.

Companies that have shown a willingness to comply with the law and to co-operate with the Commission have experienced very little difficulty in securing permission to offer new securities to the public. Relatively few of the issues examined by the Commission have failed to be approved. Some of the companies that were denied the right to solicit capital were enterprises whose set-up was so crude, and operations so carelessly conducted that they had no right to seek funds from the public. Others, in the promotional stage, carelessly and inadequately planned and supervised, were unable to give an accurate description of their operations and financial condition. Established companies, on the other hand, have been able to meet the requirements. Now that yearly reporting by listed companies is required under the Securities Exchange Act, corporations governed by this requirement, or which voluntarily assumed these obligations, will have little difficulty registering under the Securities Act. The annual statement of its operations will provide all the information needed when the corporation seeks additional capital.

At the time the Act was adopted, it was believed that the investor's principal protection would probably be derived from suits for damages against securities issuers, underwriters, directors, and others, to recover losses caused by material misrepresentation in registration statements. The amendment of the Act in 1934 was the result of criticisms of the civil-liability provisions. Suits for damages have not, in fact, been important and are not likely to assume much importance directly as a means of securing compliance. The absence of such actions can be attributed primarily to the thoroughness with which each statement is examined and to the willingness of most of the registrants to tell the truth. Although investors may seldom sue to recover damages, the presence of the civil-liability provisions in the Act has the beneficial effect of compelling disclosure of important information by registrants who would otherwise be tempted to conceal it.

The Commission has taken steps to enforce the law against persons failing to register issues and against persons engaging in fraudulent activities. Information has been assembled and compiled for the Securities Commission's files which will aid both the State and the Federal Government in detecting and pre-

venting violations. The Commission has litigated numerous cases involving the use of fraudulent devices. As a result of prosecution by the Department of Justice, fines and prison terms have been meted out to the guilty. Activity along this line will have the effect of assuring that all new issues will be registered and be subject to control and will increase the hazards of engaging in fraudulent practices.

JAMES JOSEPH BYRNE

NEW FINANCIAL RESPONSIBILITY LEGISLATION IN NEW YORK

On April 29, 1941, Governor Lehman signed the Page-Anderson Act, stating: "For a long time it has been recognized that the protection of innocent victims of automobile accidents from serious financial loss is one of the important practical needs of this State. This Bill does not introduce full-fledged compulsory insurance and it is by no means perfect. It has defects that will require correction at the next session of the Legislature. It is on the whole, however, a step in the right direction. It will make it unwise for anyone to drive without insurance. After a reported accident it will be impossible for anyone to continue driving until he has met his liability and given proof of financial responsibility for the future."

When then is the significance of this amended §6-a of the Motor Vehicle & Traffic Law? How did it come into being? In 1929, our sister State, Massachusetts, enacted legislation which required insurance on all automobiles licensed for operation within that State. This law is still in operation and there have been only slight changes in modes of administration. Compulsory insurance has been the subject of much controversy in other states and they have appointed commissions to study it. It has also been assailed in Massachusetts by those who cannot agree that it has worked out for the best interests of the public. The net result of these twelve years of discussion is that many states and all the provinces of Canada have refused to enact any legislation requiring compulsory insurance, although they have enacted other legislation which tended to solve their problems in another way. Massachusetts has continued to administer the compulsory insurance law. It is now conceded that there is little possibility that it will be repealed.

During the last week of the 1940 Session of the Legislature, Senator Hampton introduced a bill which provided for compulsory insurance in this State. There was no expectation that it would pass, but its introduction was for the purpose of starting a serious discussion. During the last decade, we had considered such a step and the so-called Berg Committee had been sent to Massachusetts to investigate. The report of that Committee did not recommend compulsory insurance although it did recommend that a deposit be made by the driver after he had been involved in an accident, if he did not carry insurance. The problem had become such a pressing one by 1940 that the Motor Vehicle Department approached Governor Lehman upon the matter. The Governor's reply was that in no circumstance would the State go into the insurance business or provide a State Fund. He pointed out that such a step would be so expensive that it would be impossible. The Governor did suggest, however, that the Motor Vehicle Department collaborate with the State Insurance Department in framing a bill that would be satisfactory to everyone. The two Departments drew up the compulsory insurance bill which was introduced by Senator Hampton. After the closing of the Session, the Joint Committee for Revision of the Insurance Law under Chairman Piper scheduled hearings for the coming summer and fall. These hearings were held in Utica on

July 24, 1940; in Bolton Landing on August 22; in Rochester on October 4; and in New York City on December 17.

At the first hearing, no group took an arbitrary stand on any of the proposals. The insurance companies were at that time also undecided as to the stand they would take. The two State Departments were also proceeding carefully and advocating rather than insisting on their proposal. They were quick to admit that there had been errors in the Massachusetts plan which should not be present in our own legislation. The Massachusetts methods of rate regulation received the greatest criticism. The Commissioner of Insurance in Massachusetts was given the power to regulate the rates. The result was that the regulation became a political football, within a short time. Every office-seeker would promise the voters that upon being elected he would see to it that the automobile insurance rates for their district would be lowered. In the Hampton Bill, rate regulation was left in the hands of the insurance companies. However, all were willing to concede from the beginning that rates in New York would certainly increase under any compulsory insurance legislation. Rates went up in Massachusetts 17% in four years; then there was a 9% reduction when coverage of "guest occupants" was removed from the policies. In chorus the cries of the taxpayers and the laments of the insurance companies arose. Even with the rate increases allowed them by the Commissioner they produced figures to prove that under the operation of the law they had been forced to lose money. Claims had increased in a greater ratio. These assertions were supported by the investigations and the books of Dr. Ralph H. Blanchard of Columbia University. As a result of such experience in Massachusetts, the companies were wary of such a proposal for New York. Consequently, they were sounding out the proposed corrections during the first two hearings.

Another criticism of the Massachusetts legislation was that the companies had been forced to take bad risks in many cases. (There might be some question under the Constitution whether anyone can be forced to make a contract. National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71, seems to intimate that this cannot be done.) Under the Hampton Bill, a board would be provided which would consist of three members - one from the Insurance Department, one from the Motor Vehicle Bureau, and one an experienced underwriter. Whenever a company refused to issue an insurance policy to an applicant, the board would have the power to decide the question and then order the insurance company to take the risk either at the regular rate or at a higher rate which they would set in each case. The board could also decide against the applicant; his privilege of driving an automobile would thus be lost. An appeal could be taken by the applicant against the insurance company but the board would find the facts in the first instance. This method appeared to be more acceptable to the insurance companies than did the methods used in Massachusetts.

Another change from the Massachusetts law was a proposal to require policies issued in this State to cover accidents not on the highways. The Motor Vehicle Bureau also wanted to include in the Bill a provision that would cover injuries to property as well

as injuries to the person. This, the Bureau thought, would do away with faked personal injury claims. It proposed also that no insurance be issued in this State unless the premiums were fully paid. In Massachusetts it is estimated that there are between 30,000 and 50,000 bootleg automobiles. This means that the owners took out an insurance policy, made the first payment on it in order to get his license plates, then no more payments, and the Motor Vehicle Bureau had the impossible job of trying to get the plates back again. Both of these proposals were overruled by the Insurance Department as being too much of a burden upon the insurance companies and were not included in the proposed law. The two State Departments were markedly making every effort to win the approval of the insurance companies to the bill which they were sponsoring. Theydid not succeed.

It was not until the third hearing in Rochester that the opposition finally took a firm stand. The insurance companies were not ignoring the fact that more motorists are killed each year than soldiers in the entire 18 months of our participation in World War I. They realized fully that the time had come when something had to be worked out to meet the growing public demand. They realized also that if they did not co-operate in drafting the legislation, then the legislation would be passed in spite of themselves and would be against their interests. This was not a small problem. There are 2,749,135 motor vehicles registered in New York State - the highest registration in the world, and equal to the combined total registrations of Germany, Italy, and Russia. In 1939, there were 73,442 accidents which resulted in an economic loss of $110,000,000 alone, exclusive of loss from deaths and personal injuries. About one-third of this sum was covered by insurance, or otherwise paid for. However, the insurance companies after a closer investigation of the possibilities under the proposed compulsory insurance bill with its alleged improvements, coupled with their saddening experience in Massachusetts, veered away from that Bill. Instead, they supported an alternative bill which followed the strict financial responsibility legislation of New Hampshire. This Bill was introduced by the Erie County Bar Association, and supported by the New York State Bar Association. It contained certain modifications which are considered necessary for our special problems. This is not a halfway measure, either. as it was first proposed, or as it was subsequently enacted. Under its provisions, all accidents must be immediately reported and if there is more than $25 damages involved both operators lose both their operator's licenses and their car registrations. The strongest feature of the law is that the car cannot be sold until the required security for the accident and all future accidents has been supplied. Under such a law all finance companies will find it necessary to require their buyers to take out insurance. Without it, if the buyer has an accident and later defaults upon his payments, the finance company cannot repossess the automobile. In these days when a large percentage of cars are bought and sold on the instalment plan, such a provision will cause an equal percentage of the automobiles on the highways to become insured.

In the proposed bill requiring strict financial responsibility there was a provision that the Commissioner be empowered to hear the facts and decide whether he thought that of the parties was

innocent. If so, the party whom he adjudged innocent would not be charged ultimately with negligence, would be exempt from furnishing security for either the accident in question or any future accidents. This carried out the true intent and purpose of this type of legislation, which is designed to place all responsibility and insurance costs upon guilty and careless drivers. The provision was not included in the Bill as it was passed, but there is strong opinion that it must be added by the next Session. There are many corrections to be made to this Bill so hurriedly considered and passed, and this is the one most strongly urged. Such a strictly administrative function will be rather novel for the Motor Vehicle Bureau. It may present some interesting difficulties, the first of which will be the cost of administration. The Bureau already holds some 20,000 hearings a year concerning license revocations. This is accomplished by the use of 14 referees. The number, it is estimated, will have to be increased about threefold, at an additional cost of $350,000 for this one item. Furthermore, Commissioner Mealey has pointed out that he could not use such a discretion as has been suggested unless the Legislature sees fit to make these reports confidential (as they are in many States). At present our accident reports are public records, which can be used in civil suits involving these accidents. The driver found guilty by the Commissioner would be in an extremely embarrassing position. He would probably be inclined to settle any suit brought against him even if he had been misjudged by the purely administrative official. The answer, of course, is for the Legislature to bar all such evidence from our courts, as it could do without difficulty.

While the Commissioner should always require security unless he is "pretty sure" that one party cannot be held, some discretion is quite necessary. One example will illustrate the point: Suppose I leave my car parked, and while away from it, another driver runs into it, causing damage of more than $25. Perhaps the entire $100 damage is done to his car. Under the law as it now exists, I will be required to put up the security to cover the damage althoug I was in no way involved in the accident except by the ownership of my automobile which was parked. In addition I will be required to take out an insurance policy for the future. Unless I am able to do this I will be unable either to drive my car or to sell it to another. This is not within the intent and purpose of this statute. An innocent owner and careful driver can be penalized under such a provision. Until a recent amendment, such was the situation in New Hampshire, but it was the unauthorized practice for the Commissioner there to dispense with security requirements in these unquestionable parked car cases. Their law now provides that the Commissioner shall have the power to judge the facts and to relieve the innocent. Even if they had not seen fit to change their law, which affects only 500,000 people, our laws which govern 13,000,000 should be carefully drafted so as not to become oppressive.

The most conspicuous result of the hearings before the Joint Committee was the overwhelming opposition which was brought forth against any form of compulsory insurance. In June, Edward C. Stone insurance executive, addressed the Mid-Year Meeting of the New York

State Bar Association and delivered the first broadside against the Bill. At the October hearing in Rochester the Erie County and the State Bar Associations led the counterattack on the measure by proposing the alternative bill which has previously been mentioned. The New York State Association of Local Agents, 5,000 strong, immediately followed to reinforce the growing opposition. They used the statistics and books of Dr. Blanchard to prove the unsuccessful operation of the law in Massachusetts. The State Grange, represented by Raymond I. Cooper and supported by some 132,000 members, also voiced opposition to any measure which promised to be unduly oppressive to the farmer. (There would be a serious question involved if farmers and workmen who drive relatively few miles in a year, yet for business reasons had more than one car, had to support a heavy tax load for which they were not proportionately responsible. There should be a direct relation between exposure and accidents.) Mr. Cooper was quick to insist that there be no suggestion of special legislation for the farmer. He did not, however, seem to think that compulsory insurance was the right answer for any part of the public.

At the fourth hearing in New York City, the Insurance Brokers of New York, Inc., voiced strong arguments against the proposed measure. The Queens County Bar Association went on record as opposing the Bill because they feared that it would prove to be an opening wedge for some form of compulsory insurance in the future. Other individuals and groups advanced their opinions for or against this legislation at these hearings, but the forces were never evenly matched. Opponents of the Bill seemed completely to overcome all argument with which they met. When the Legislature again met in the 1941 Session, it was apparent that neither house was favorably inclined towards compulsory insurance. The Bill was shelved. However, its major and primary purpose had been served. Serious discussion had resulted and a compromise measure had been passed.

I feel that the most able arguments in favor of compulsory insurance were presented, at the hearings, by Mr. D. Roger Kenney, insurance editor, U.S.Investor. He had been damning the Massachusetts law for several months in his column before he was sent to that State as a paid investigator by some of its citizens. As an impartial observer, he gathered his data. As a disinterested witness at our hearings, he gave much valuable information. Summed up briefly, the arguments are these: There is no human right to drive a car which is an inherently dangerous instrument. Those who cannot afford insurance will not be able to meet the bills for any damage they may cause. Statistics show that the safety problem is entirely divorced from the problem of compulsory insurance and that it has therefore not resulted in more accidents in Massachusetts. That one reason for the increase in rates in Massachusetts was that property injury was not covered in their policies, due to some question and doubt over the constitutionality of such a requirement. This led to faked personal injury claims. Also, that there has been an actual reduction in average claim costs since more just claims are paid. The public, therefore, has received better protection.

Arguments enumerated against compulsory insurance are: It will cost $50,000,000. This will be added to the already staggering burden of $133,000,000 paid by motorists for registration and gas taxes. The motorists are not the only ones involved, in many accidents, yet they are the only ones who are asked to pay the costs. There is much which will not be covered by compulsory insurance. Under the Massachusetts law, there is an estimated 30,000 to 50,000 bootleg cars. Non-residents, who drive 4% of the cars on our roads, are not within this law. The operator of the car or his guests are not covered by the policy, nor does the insurance cover trips taken outside the State. Collisions with stationary objects, or with streetcars, etc., are not included. For these reasons, it has been pointed out that compulsory insurance is not a cure-all, either in preventing accidents or in paying for them after they have occurred. It must not be overlooked that many people who do not carry insurance are nevertheless responsible for their accidents. In 95% of the accidents, less than $500 damages is involved. Taking these facts into consideration, the additional coverage by compulsory insurance is too slight to justify a burden of $50,000,000 on all owners, indiscriminately. It is claimed that if we obtain 70% voluntary coverage here, under a financial responsibility law, as they have done in New Hampshire, we will in fact have as complete an all-over coverage as they have obtained in Massachusetts under compulsory insurance. And this will not involve the higher rates and the limited policies which they have been forced to accept.

The argument that it is better to coerce gently than to compel by force of law is a strong one. Under financial responsibility legislation, the fear of the hazard of red tape and the retroactive features of the law will force an individual to take out insurance but this would lack many of the unsatisfactory elements of the compulsory insurance law. New Hampshire reports only about 250 license revocations a year. Even if we assume that all these result from unpaid judgments, the number is so low as to illustrate the effectiveness of a statute of this type. By insisting upon payment of the damages resulting from the first accident, the criticism that financial responsibility laws of the past have been allowed a "first bite" has been successfully avoided. Whenever people face the alternative of either paying the judgments against them or being prohibited from ever driving again or from selling their automobile, they will usually secure the money. Since in 95% of the accidents, the amount involved is less than $500, this is true even of those who had not been carrying insurance. Adding to this the fact that finance companies will be forced to require insurance in the first place on all cars which they handle, it is quite conceivable that this law will work out well.

Governor Lehman has said that this Bill is a step in the right direction. After the release of his statement of approval, the newspapers commented upon the new law and reported that between 400 and 600 people were expected to be required immediately to put the legislation into operation. There will be an estimated 600,000 to 700,000 cases reported each year and it is said that $300,000 will be required to take care of these alone. Although the Com-

missioner is not now required to pass upon the guilt or the innocence of the drivers, he does have the duty of determining how much security is to be put up by each party and these administrative duties will begin on January 1, 1942. He has the power to make all rules and regulations for his hearings and an appeal to the courts is allowed to the party aggrieved.

The Committee on Legislation of the Association of the Bar of the City of New York suggests these changes to be made next year: Consideration should be given to amending §94-e to allow the Commissioner to exempt one from furnishing security who has satisfied him that he did not contribute to the accident. (Such a provision has been passed in New Hampshire to correct the arbitrary rule there; it will take effect on January 1, 1942.) Also, they contend that §§94-h (c) and (d) which now provide that no motor vehicle "in any manner involved" shall be registered until security is given, should be made to apply except to the automobile causing the damage. They suggest that the Commissioner's present broad discretion to suspend a license "upon any reasonable ground appearing on the records of his bureau", should be given some standard for its execution. (The new provisions for reporting all accidents are much broader than the old provisions which merely required a report upon a personal injury.) They contend that the old statute should be repealed to avoid all possibility of error and confusion. These are good suggestions.

ARTHUR ARNOLD ARMS, JR.

WHAT IS CIVIL CONTEMPT OF COURT?

The case of Nye v. U.S., ___ U.S. ___, 85 L.Ed. 783, decided by the United States Supreme Court, presents a new interpretation by the Court of §268 of the Judicial Code. That section of the United States Code defines the power of the United States courts summarily to declare a person in civil contempt of court. It provides, "The said courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any persons in their presence, or so near thereto [italics ours] as to obstruct the administration of justice." (28 U.S.C.A. §385.) Much broader, §135 of the Criminal Code stipulates when the court may punish for criminal contempt, no reference being made to whether or not the misbehavior occurred in the presence of the court or near the court since the procedure for conviction of criminal contempt would involve the finding of an indictment and trial by jury, while in the case of a civil contempt the court or the judge may dispose of the matter at a hearing of an order to show cause. The difference between civil and criminal contempt is that in the former the punishment is wholly remedial and serves only the purpose of the complainant, while in the latter the punishment is intended as a deterrent to offenses against the public.

This case arose when one Nye, the petitioner, was adjudged guilty of civil contempt under §268 of the Judicial Code. The facts were simply these: One Elmore, an administrator of his son's estate, had started an action against a partnership which manufactured medicine. Elmore's son had died as a result of using the medicine. The father, being a poor man, was assigned counsel - one Guthrie - to represent him. Some friends of the partners, defendants in the action, desired to terminate the action and do their friends a good turn. These friends were Nye and Mayers, the petitioners in this action. They called on Elmore without the knowledge of Guthrie, his attorney. Elmore was an illiterate and feeble-minded old man. After giving the old man a few drinks, they convinced him that he should not sue the medicine company. They had their own lawyer prepare letters to the District Judge, and to Guthrie, Elmore's attorney, telling them of the termination of the suit. They even took the old man to the Probate Court to have him discharged as administrator of the estate. Then Nye and his colleague left their victim to return to his lawyer without his cause of action. These events all took place 100 miles from Durham, North Carolina, where the District Court was located.

When Elmore's lawyer heard what had happened to his client, he immediately filed a motion asking for an order requiring Nye to show cause why he should not be held for contempt of court. The District Court issued a show cause order and there was a hearing. Evidence was introduced and the Court found that the acts of Nye and his partners were for the express and definite purpose of preventing the prosecution of the civil action in the Federal

Court and with intent to obstruct and to prevent the trial of the case. The Court also held that their misbehavior was so near to the presence of the Court as to obstruct the administration of justice, and adjudged each guilty of contempt. They were forced to pay certain costs. The Circuit Court of Appeals affirmed that judgment. A petition for certiorari was granted by the Supreme Court because the interpretation of the power of the Federal Courts under §268 of the Judicial Code to punish contempts, raised questions of grave importance. It is the Court's interpretation of this section that will be considered here, although other questions which did not concern the merits of the case were considered by the Court.

The majority of the Court held that the acts of these men were not committed "so near" the presence of the Court that they could be summarily adjudged by the Court itself. They held that the petitioners could be punished under the Criminal Code where the safeguards surrounding criminal prosecutions would be afforded them, but not under the Judicial Code. The Court then discussed the phrase, "so near the presence of the Court."

Allow me to digress and to point out the way in which the Supreme Court had formerly interpreted the phrase. In Re Savin, 131 U.S. 267, a District Court held a man for contempt under the Judicial Code, when he attempted to bribe a witness at a place in the court house, but outside the courtroom. The act caused no disorder or disturbance in the court. The Supreme Court upheld the lower court's holding. In Sinclair v. U.S., 279 U.S. 749, an adjudication of contempt under the Judiciary Code was upheld by the Supreme Court because the petitioner had a detective agency shadow members of the jury to spy upon them and to bribe and intimidate them. These acts certainly were not within the presence of the court nor anywhere near it. In Craig v. Hecht, 263 U.S. 255, the acts of the petitioner, Craig, Comptroller of New York City, consisted in writing letters which assailed a United States District Judge. The letters were written at a point distant from where the judge sat. The petitioner was adjudged guilty of contempt under this section. In the case of Toledo Newspaper Co. v. U.S., 247 U.S. 402, the newspaper company was adjudged guilty of contempt for publishing in the city, where the court was sitting, articles concerning a pending equity case. Counsel maintained that it was not alleged, proved, nor found that any of the publications were brought into the court building or read by the judge, and therefore he lacked power under §268 of the Judicial Code. The Supreme Court in upholding the adjudication of contempt stated, "There can be no doubt that the provisions (§268) conferred no power not already granted and imposed no limitations not already existing. The provisions, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor obstructing or qualifying the powers granted by necessary implication, recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test therefore is the

character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." (At page 419.)

The court in the Nye case, by a five-to-three decision, overruled the Toledo case. The phrase "so near thereto" was given a geographical meaning rather than the casual meaning it had previously been given. The court pointed out that the word "near" suggests physical proximity and not relevancy and that behavior such as occurred in this case would be covered by the broad terms of the Criminal Code. (85 L.Ed. 740)

The Chief Justice and Messrs. Justices Stone and Roberts objected to the about-face the majority took in the interpretation of the Judicial Code. They pointed out that the court has without a dissenting voice regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operations in producing the obstruction depends on other than geographical relationship to the court. They discussed the cases referred to above. They contended that Congress did not intend, by the use of the phrase, to distinguish between the contemptuous acts which took place "across the street, the corridor, in another block, or a mile away," and those acts which took place actually within the courtroom. (85 L.Ed. 744)

Although the dissenting opinion presents a strong argument against changing the interpretation, the discussion by the majority of the history and the purpose of §268 of the Judicial Code, seems to indicate that Congress intended the section and the phrase "so near thereto" to be given a geographical meaning rather than a casual one. The section was derived from the Acts of March 2, 1831, which provided that the courts of the United States "shall have power **** to punish by fine or imprisonment at discretion of said courts, all contempts of authority in any cause or hearing before the same." (85 L.Ed. 738) This, clearly, was very broad and consequently it led to a great many abuses. The most notable of the abuses was that concerning James H. Peck, a Federal District Judge, who had imprisoned and disbarred a lawyer for publishing a criticism of one of his opinions. Congress, seeing that the Code as it stood gave too much authority to the judges, changed it to its present form, limiting its scope. If that section and phrase be given a casual instead of a geographical meaning, would not the section regain much of the generality which Congress in 1831 essayed to remove? This is the question and the argument presented by the majority of the Court. It seems to this writer to be most weighty. At the same time, however, since the Supreme Court has not given the section that interpretation and since it is so important that a judge have the power summarily to prohibit acts which will obstruct justice, can it not be said that it would be a better policy to allow a broad interpretation of this section and rely upon the discretion of the judges, and our remedy of impeachment, as means of seeing that that discretion is not abused? Would it not be better to adhere to the doctrine of stare decisis since the Court has given this interpretation of the section. Might not the burden of changing the rule better rest on the legislative

branch of the Government, if it is to be changed at all? These are the questions presented by the dissent, and although I believe that Congress did intend the Judicial Code to be interpreted as it was by the majority in this case, I do not feel that the Court was justified in overruling its former holdings, and giving a different interpretation to the section.

JOSEPH AUGUSTUS SANTRY

REITZ v. MEALEY - VEHICLE AND TRAFFIC LAW §94-b

The petitioner in this action has made an application for an order permanently enjoining the Commissioner of Motor Vehicles of the State of New York from suspending the chauffeur's license of the petitioner, on the ground that §94-b of The Vehicle & Traffic Law, under which the Commissioner is acting, is unconstitutional. The facts which gave rise to this application, are: A judgment was obtained against the petitioner for the sum of $5,000 for personal injuries resulting from the negligent operation by Reitz of a motor vehicle in this State. Thereafter, the attorney for the judgment creditor forwarded to the Commissioner a transcript of the judgment record, with an affidavit to the effect that the judgment was unsatisfied. The Commissioner suspended the petitioner's chauffeur's license. A month later, the petitioner was declared bankrupt, but he had not yet applied for the discharge of his debts. This judgment, however, is dischargeable in bankruptcy.

It will be interesting briefly to note the history of this case in the courts. After a hearing before the Statutory District Court, consisting of three judges, for the Northern District of New York, the petition was dismissed. The Court held by a two-to-one decision that §94-b of the Vehicle Law was constitutional. (34 Fed. Supp. 532) The petitioner then appealed to the Supreme Court of the United States. The judgment of the District Court was automatically affirmed since the Court was equally divided. This order dismissing the appeal was entered on April 14, 1941. The plaintiff immediately petitioned for a re-hearing, on the ground that during the argument of the appeal some members of the Supreme Court indicated that the petitioner's action was premature, due to his failure to obtain the discharge of his debts prior to the commencement of the action. This application was granted. The proceedings for his discharge will be commenced in June, 1941, so that when the time of rehearing arrives the constitutionality of this section will be squarely before the Court.

As amended in 1939, §94-b, provides in substance that the operating license of a person against whom a judgment has been rendered arising out of a motor vehicle accident, shall be suspended, upon written demand of the judgment creditor, if such judgment is not satisfied or discharged within 15 days after it becomes final, except by a discharge in bankruptcy. Such suspension shall continue for such part of three years as the judgment remains unsatisfied unless the judgment creditor consents in writing to the reinstatement of the license before the expiration of three years. Proof of future ability to respond in damages must be shown before the license will be returned.

This section formerly provided, in substance, that if a judgment was entered against a driver for damages for injuries to personal property, and if it remained unsatisfied for 15 days, the clerk of the court where the judgment was entered, was required to forward a copy thereof to the Commissioner of Motor Vehicles, whose duty it was then to revoke the license. The amendment, it

will be noted, now gives the judgment creditor all power to start, stop, and restart the statutory machine.

The brief of the appellant attacks the constitutionality of this section, as it now reads, on the following grounds: That the statute invades the field of bankruptcy, which by the United States Constitution is a field, control of which is exclusively delegated to Congress; that the statute deprives the appellant of his property (the right to drive an automobile) without due process of law by permitting the remedy of the creditor to survive the discharge of the debtor in bankruptcy. Thereby he is deprived of the full benefit of a discharge in bankruptcy, to which he is entitled under the Constitution and the Bankruptcy Act.

The brief of the respondent upholds the constitutionality of this section on the grounds that it is a valid exercise by the State of New York of its police power; that it does not improperly invade the field of bankruptcy delegated to Congress, since by §17 of the Bankruptcy Act (28 U.S.C.A. §35), Congress merely intended to afford in defense of an action on the discharged judgment, without interfering with state legislation whose incidental effect is to compel the payment of a discharged judgment.

The majority of the District Court upheld the constitutionality of this section. In its opinion, there was no necessity to consider the effect of the amendment, nor the effect of the amendment upon the constitutionality of the original section. The ground of this holding is the principle that a statute, itself constitutional, is not affected by an unconstitutional amendment. (People ex rel. Farrington v. Mensching, 187 N.Y. 8; Markland v. Scully, 203 N.Y. 158; N.Y.C.& H.R.R.Co. v. Williams, 199 N.Y. 108.) The majority upheld the statute as a valid exercise of the police power, dismissing the contention of the appellant that it was a violation of the Fourteenth Amendment, summarily. In considering the contention that it invaded the field of bankruptcy, the opinion continued: "***** if §17 [of the Bankruptcy Law] must be read as relieving bankrupts of all sanctions for collection of dischargeable debts, no matter what other public purposes they may serve, the section is invalid, for the Bankruptcy Act is paramount. We do not thing the section so much impedes the states in their polity. Inability to pay one's debts is not irrelevant in determining one's fitness for many kinds of activity."

Cooper, J., in his dissenting opinion, held that the statute was not only an invalid exercise of the police power, but also an invasion of the field of bankruptcy. He stated that the original section (Vehicle & Traffic Law §94-b) must be read in connection with the amendment. "This act is an integral and indivisible unity. It has for a purpose but one thing, viz, a statutory scheme by which the negligence judgment creditor may collect his judgment, *****. When the part of the statute found unconstitutional is so connected with the general scope and purpose of the Legislature that its imperfections destroy the latter, it cannot be eliminated and the statute as a whole must fall." He distinguishes this case from those cited by the majority opinion on the ground that those cases involve complicated taxing acts or complex regulatory acts.

It is the opinion of the writer that this section is unconstitutional, that the dissenting opinion of Judge Cooper, sustaining the contentions of the petitioner is the proper conclusion.

This section is an invasion of the field of bankruptcy, delegated exclusively to Congress. The purpose of the Bankruptcy Act is to rehabilitate the debtor in order that he may begin anew, and to restore him to business activities in the interest of his family and the general public. (Kalb v. Feuerstein, 308 U.S. 443; 43 Yale Law Journal 344) If this section is enforced, the petitioner is deprived of his means of livelihood for three years until he has paid a debt discharged in bankruptcy. The purpose of the Bankruptcy Act is defeated, or, at the least, the effect of the discharge is impaired. Judge Cooper states: "**** it is an attempt on the part of one state to withdraw from the Federal Government, for the benefit of a limited class of persons, a portion of the bankruptcy power delegated by the States to the Federal Government in the Constitution and thereby destroy the uniformity of the bankruptcy laws **** When a state by statute, not a valid exercise of the police power, attempts to do so, it invades the Federal field*****" In the case International Shoe Co. v. Pinkus, 278 U.S. 261, the court stated: "A state is without power to make or enforce any law covering bankruptcies that conflicts with the national bankruptcy laws***** States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."

The invasion of the bankruptcy field can not be justified under the police power. The primary object of this section appears from its context. It is designed to aid a particular class - creditors who hold a judgment for damages resulting from the negligent operation of an automobile. Public welfare no longer appears to be the primary purpose. Since the amendment, nothing happens to the judgment debtor unless the judgment creditor wills it so. Judge Cooper states: "It will be seen that this section makes the Commission a disguised collection agent for the judgment creditor. All public policy of protection for the public is eliminated. No longer must the non-paying judgment debtor inescapably lose permanently, or for three years, his right to operate a motor vehicle, unless he pays the judgment." The Commissioner no longer has the power to revoke a license on his own motion. It can no longer be said that the purpose of the statute is to allow only those persons to use the road who are financially responsible. The test of whether or not a person can use the roads after a judgment has been secured against him is not whether he paid the judgment, but whether the judgment creditor elects to have the license taken away. However, assuming that the benefit of the creditor is the primary purpose of this section, the benefit to the public under this construction is too remote to justify it. The fact that the persons injured may become public charges is not a fact that would appear to be sufficient to justify the determination of a public policy by the state, contrary to that expressed by Congress - the rehabilitation of the bankrupt.

The objection that this statute, in effect, delegates its enforcement to unknown private citizens at their discretion and for their own interest, is a valid one. The statute does attempt to delegate the police power to individuals. The police power can not be delegated even to a public officer to be exercised at his discretion. (People v. Klinck Packing Co., 214 N.Y. 121.)

The one remedy open to creditors holding judgments recovered against negligent operators of automobiles lies with Congress. Congress could make such judgments not dischargeable in bankruptcy.

DUNTON FORT TYNAN

KAMERER v. CURTIS - THE NECESSITY OF TENDER

The New York Advance Sheet contains a rather unusual case - Kamerman v. Curtis, 285 N.Y. 221 - in which the Court of Appeals made a startling decision in a suit based on rescission for fraud or misrepresentation.

The facts in the case are quite simple. The plaintiff and the defendant formed a partnership as brokers, which enterprise resulted in one sale negotiated by the defendant which netted the partnership commissions amounting to approximately $48,000. Upon the request of the defendant, this sum was paid to him by two separate checks, one drawn for $43,000, the other for $5,000. Thereupon the defendant cashed the $5,000 check, and induced the plaintiff to believe that this sum represented the total commissions due, and to accept $2,500 as his share, for which sum the plaintiff executed a general release, the defendant representing that all concerned in the transaction were executing releases.

After discovery of the true situation, the plaintiff brought an action in equity to dissolve the partnership, for an accounting, and to recover one-half of the actual commission. The defendant, in his answer, denied the existence of the partnership and denied that the alleged transaction had taken place. As a separate and complete defense, he set up the release mentioned above. The plaintiff, in his reply, admitted the execution of the release, but alleged that he was induced to execute it, by the fraudulent representations of the defendant.

This being the condition of the pleadings on the opening of the trial, the defendant's counsel objected to further proceedings since the general release was a bar to the prosecution of the action and the plaintiff's reply, claiming rescission for fraud could not be considered as there was no tender of the consideration paid therefor. He then made a motion for judgment on the pleadings, which the court at Special Term denied. Thereupon, the plaintiff proved the facts stated above, which facts the defendant in no way denied, and an interlocutory judgment was entered in the plaintiff's favor. That judgment is here reviewed on appeal.

The majority restricts itself to a consideration of the ruling on the motion. It is the opinion of this writer that it was unfortunate for the Court of Appeals to base its decision on a technical point of pleading, when the case should have been considered as a whole.

Perhaps it would be a propos to discuss briefly the rules of law related to the requirement of tender in rescission cases. For a party to avoid a transaction for fraud or misrepresentation, it is essential that he make an offer promptly after acquiring knowledge of the fraud or misrepresentation to return what he has received under the agreement. Restatement §480(1). This is a condition precedent to avoidance or rescission. As Judge Beardsley

expressed the rule in Masson v. Bovet, 1 Denio 69: "The party who would disaffirm a fraudulent contract, must return whatever he has received upon it. ***He must rescind in toto, if at all. ***He must not hesitate, nor can he be allowed to deal with the subject matter of the contract and afterward rescind it."

The agreement is an absolute bar. A party cannot retain the benefits received under it and at the same time proceed in disaffirmance. (Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75; E.T.C.Corp. v. Title Guarantee & Trust Co., 271 N.Y. 124; Casey v. Kastel, 237 N.Y. 305; Getty v. Devlin, 59 N.Y. 402.)

In an action at law, based upon a rescission of a voidable contract, the rule has long been established that the party must restore or offer to restore before suit whatever he has received by virtue of the contract. (Casey v. Kastel, supra; Gould v. Cayuga Co. Nat'l Bank, supra.) However, if the action be one in equity for a rescission, it is sufficient to offer in the complaint to return the amount and to make tender upon the trial. (Vail v. Reynolds, 118 N.Y. 297, 302; Berry v. ...C.Ins. Co., 132 N.Y. 49.)

This distinction is unimportant in a consideration of the case under discussion since, although it is obviously an equitable action, no tender has ever been made. As a matter of fact, the plaintiff refused to tender the $2,500 upon a demand of the defendant's counsel at the beginning of the trial.

The general rule as to the necessity of an offer of restoration in an action to avoid an agreement for fraud or misrepresentation is subject to some very practical exceptions. (See Restatement §480(2).) Tender is excused where the consideration received under the agreement is wholly worthless, i.e., incapable of serving any purpose of advantage by its possession or control. (Bassett v. Brown, 105 Mass. 551, 558.) Also, avoidance is not precluded in cases where the consideration is destroyed or injured by the act of the fraudulent party, or has deteriorated by its failure to possess the quality represented. Also, where the wrongdoer has, by his own act, complicated the case so that full restoration cannot be made, he has but himself to blame. (Hammond v. Pennock, 61 N.Y. 145.)

The last exception, the one upon which the plaintiff's counsel here relied, is that where a party has received a sum of money only, the amount of which may be credited against the recovery to which he is certainly entitled, he need not make offer of restitution. (Gould v. Cayuga Co. Nat'l Bank, supra.) For example, where a plaintiff held a judgment against the defendant which constituted a lien upon his land, and the defendant, by false and fraudulent representations as to his being a member of a reliable firm, and by payment of the plaintiff's attorney's fees in the former action in which the judgment was obtained, and by a promise to pay the judgment, induced the plaintiff to give a satisfaction piece, the plaintiff's subsequent action for rescission on the ground of fraud was not barred by a failure to tender the attorney's fees received, since she was entitled to these in any event - win or lose. The sum must be one which the plaintiff would

be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability. (Kley v. Healy, 127 N.Y. 555.)

As pointed out above, if the case at bar be considered only upon the pleadings submitted and the motion for judgment thereon, it seems obvious that this situation cannot be included within the exception stated. By reason of the defendant's denial of the very existence of the partnership relation and of the transaction itself there is nothing "admittedly due" the plaintiff here against which he can offset the $2,500 he has retained.

The majority goes on to strengthen the position to which there is no argument, by pointing out that since there was no fraud in the factum, but only fraud in the treaty, the release was voidable merely, and not void. (Whipple v. Brown Bros Co., 225 N.Y. 237, 241; Boxberger v. N.Y.L.H.& H.R.R.Co., 237 N.Y. 75, 78.) The release being voidable, the plaintiff is thereby prohibited from proceeding in its disaffirmance in the absence of a rescission by return of the $2,500 or a suit for a rescission in which a tender is made in the complaint.

What then is the grievous error that has been committed? As Judge Finch intimates, in what unfortunately is the dissenting opinion, the majority has successfully netted the red herring. This is not an appeal from the denial of the motion for judgment on the pleadings. The plaintiff, in order to establish his right to an accounting, successfully proved the facts as stated above without any evidence on behalf of the defendant to contradict. An interlocutory judgment appointing a referee and directing an accounting was entered on a decision of the court at Special Term and was unanimously affirmed by the Appellate Division. Thereafter, the parties came on for actual trial upon which the same facts were proven without contradiction and final judgment was entered. The defendant appealed directly from the final judgment to the Court of Appeals, and, of course, review was thereby limited to the interlocutory judgment. However, a review of the interlocutory judgment necessarily includes consideration of the facts established at Special Term upon which that judgment is based. The majority restricts its consideration to the ruling upon the motion for judgment on the pleadings, ignoring the uncontroverted facts brought out on the trial. There seems to be no valid reason for their persistent refusal to consider these facts.

Judge Finch opens his dissent in this manner: "It is submitted that a reversal of this judgment would in any event be placing too much emphasis on procedure at the expense of the merits in addition to disregarding the command of the statute that we disregard errors if any which would not change the result." (C.P.A.§105

It was the writer's opinion that §105 of the Civil Practice Act, which directs the court to ignore errors which do not materially affect the result, was in harmony with a trend of the courts towards simplification of of practice and away from the practice of law on technicalities which thwart justice. The Court of Appeals denies this.

The writer does not believe that it would ever have been prophesied that a case such as this, where the facts established are within the case on review, would be upset upon a technicality of practice which unquestionably contravenes the obvious justice of the situation.

A sister State has expressed what, if it is not, should be the manner of application of the rule involved: "The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right." (Roberts v. James, 83 N.J.Law 492.)

In American Union Bank v. Gubelman, 212 A.D. 408, 209 N.Y. Supp, 212, the court qualifies the rule in this manner: "Some of the earlier cases enforced the rule with much strictness, but the trend of the later cases is in favor of a more reasonable and equitable application of the rule." Here are cited Corse v. Minn.Grain Co., 94 Minn.331, 102 N.W. 728; Sisson v. Hill, 18 R.I. 212, 26 Atl. 196, 21 L.R.A. 206; Bostwick v. Mutual Life Ins.Co., 116 Wis. 392, 89 N.W. 538, 92 N.W. 246, 67 L.R.A. 705; Bell v. Anderson, 74 Wis. 638, 43 N.W. 666; Potter v. Taggart, 54 Wis. 398, 11 N.W. 678.

In conjunction with this expression of attitude are other statements which are inconsistent with the decision in the Kamerman case. In Marr v. Tumulty, 256 N.Y. 15, where a contract was induced by the fraud of two of plaintiff's co-directors, and the plaintiff and his innocent co-directors tendered shares of stock received as consideration for the contract but no tender of stock held by the malfeasant co-directors was made, Judge Cardozo stated that "Refusal may not be used as an excuse by partners in their guilt to keep the wrong alive. Equity is not crippled at such times by an inexorable formula. [Italics mine] In exacting the return of benefits, it proportions the exaction to the justice of the case before it."

So here, in the Kamerman case, where such compelling facts are uncontrovertibly established upon the trial, it should be apparent that the consideration retained by the plaintiff was "admittedly due" him in the equitable sense. And, disregarding the rule that the court has the power in order to sustain a judgment, to order that the pleadings shall conform to the proof at the trial (Livingston v. Livingston, 246 N.Y. 234), in view of these facts, the court should hold that such error was not reversible error.

Whether or not the Kamerman case will be followed in the future is a matter of the purest conjecture. However, it would seem wise to avoid presenting the court an opportunity to strengthen the authority of such an inequitable decision.

RICHARD FREDERIC SCHWERZMANN

PEOPLE v. JOHN DOE (RE BERNOFF) - THE RIGHT TO APPEAL

In the recent case of People v. John Doe (Re Bernoff), 261 A.D. 504, there is raised an interesting question concerning the right of appeal. In this case, Bernoff attempts to appeal from an order directing him either to furnish security in the sum of $50,000 for his appearance as a witness, or be committed to the House for the Detention of Witnesses. This order was entered pursuant to the provisions of §618-b of the Code of Criminal Procedure. This Section reads:

> Whenever a judge of a court of record in this State is satisfied, by proof on oath, that a person residing or being in this State is a necessary and material witness for the People in a criminal action or proceeding pending in any of the courts of this State, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person to enter into a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may be heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a State prison, as he may deem proper, until he comply or be legally discharged.

The court, by a three-to-two decision, found: "****this is an order in a criminal action and the right to appeal therefrom must be found in the Code of Criminal Procedure. In People v. Reed 276 N.Y. 5, the Court of Appeals pointed out that the right of appeal is entirely a matter of statute, a matter of legislative control. We find no provision for an appeal from an order entered in accordance with the provisions of §618-b of the Code of Criminal Procedure.****The appeal should be dismissed."

The prevailing and dissenting opinions differ upon the nature of the order here issued. I i an order in a criminal proceeding, so that the right of appeal must be found in the Code of Criminal Procedure? Or is it a final order in a special proceeding, from which the right of appeal may be found in the Civil Practice Act?

The prevailing opinion argued: "It is an order of a judge of the Court of General Sessions and is in an action entitled 'People of the State of New York on the complaint of _____ against John Doe and Richard Roe.' It recites that the action referred to in the moving affidavit is now pending in that court. It does not appear that any question was raised as to the pendency of the actic at the time the order was signed. The order is an order in a crimi nal action.

"Furthermore, an order fixing bail is not a final order. This court recently held that such orders are not appealable, People ex rel. Deliz v. Warden of City Prison, 260 A.D. 155."

It would seem that this finally determines the question, and defeats the appellant's attempted appeal. The cases hold that the right of appeal is statutory, not constitutional. Since the section of the Criminal Code providing for this order gives no right of appeal, it would seem that there is none. However, the opinion of the two dissenting judges should be given close consideration.

On examination of the original papers, they point out: "That the affidavit on which the order was made does not allege the pendency of any particular criminal action or proceeding, but only that the office of the district attorney has, without success, attempted to locate the appellant. The significance of the omission is revealed by a statement to the court by the assistant district attorney that the appellant is required as a material and necessary witness in an investigation now pending in the District Attorney's office.

"If the order is appealable, it would seem that it must inevitably be reversed, for the statute does not authorize the incarceration of witnesses during an investigation by the District Attorney, since such an investigation, however protracted it may be, may not disclose the existence of any crime and may never result in criminal proceedings in which the testimony of the witness is material.

"The question is whether this court may entertain and consider the appeal. It is my understanding that the theory on which the appeal is to be dismissed is that it constitutes an appeal from an intermediate order in a criminal action and that the Code of Criminal Procedure permits an intermediate order or proceeding forming a part of the judgment roll to be reviewed only on appeal from the judgment of conviction.

"In my opinion the proceeding in which this order was made is not a criminal proceeding, nor is it an intermediate order which could be reviewed on appeal from a final judgment. It is a final order in a special proceeding General Construction Law §46-a and as such is made appealable by Subd.2 of §631 Civil Practice Act."

As to the first element - its finality - they point out that the order, as far as appellant is concerned, constitutes a final determination that he must furnish a bond or be committed to the House for the Detention of Witnesses. No further proceedings are necessary for a complete adjudication of the only issue presented to the court below.

The dissenting opinion continues with this argument: "The proceeding is not maintained in any criminal action, for the contro versy is exclusively between the People and a party who is not charged with any crime. The witness is not concerned with the determination of the criminal action in which his testimony is required. The defendant in the criminal action is not a party to this proceeding in which the witness is directed to furnish a bond. The defendant in the criminal action could not appeal from the order which directs the witness to furnish such an undertaking,

and conversely, the witness could not appeal from any judgment of conviction in the criminal action."

The dissenting judges point out: "The mere fact that the provisions under which the order was made are found in the Criminal Code is not decisive upon the question of this being a criminal or a civil proceeding. We know that proceedings of a civil nature are often authorized by our Penal Law." They cite Matter of Julius Restaurant v. Lombardi, 282 N.Y. 126. In this case, the petitioner was allowed to bring a summary proceeding to enforce §964 of the Penal Law restraining unfair business practices.

The opinion of the dissenting judges continues, "Nor is the circumstance that the proceeding was instituted in the Court of General Sessions decisive for by the expressed terms of §618-c Code of Criminal Procedure it could have been entertained by a judge of any court of record. What is decisive is the nature of the proceeding and whether it is criminal in character. In that connection, I repeat, for emphasis, that the witness was not charged with any crime and that the only purpose for the proceeding was to secure his appearance at the trial by requiring him to furnish an undertaking to that effect."

They cite §§5 and 6 of the Code of Criminal Procedure, which provide: "The proceeding by which a party charged with a crime is accused and brought to trial is known as a criminal action. **** A criminal action is prosecuted in the name of the People of the State, as plaintiffs, against the party charged with the crime."

They further define the nature of the action by citing C.P.A. §6, which provides, "The term, a civil action, means any action except an action prosecuted in the name of the people as plaintiffs against a party charged with a crime."

"Since the appellant is not charged with the commission of any crime and since the proceeding is not an intermediate order in any action, it is necessarily civil in character and final in effect. The pendency of the criminal action is merely the occasion for the special proceeding whereby witness is required to furnish a bond to assure his appearance at the trial. It is evident, moreover, that the Legislature did not regard such a proceeding as criminal in character for it provided that it might be maintaine before any judge of a court of record in this State, many of which have no criminal jurisdiction."

It is suggested that the appellant might secure adequate relief by securing a writ of habeas corpus. But even if this were true, it would not affect his right to appeal from the order, for the two remedies are not mutually exclusive. It is indeed true that inability to review the determination by appeal has often been suggested as a reason for the granting of a writ of habeas corpus. (People ex rel. Stabile v. Warden, etc., 202 N.Y. 138.) But should it be suggested that the right to maintain habeas corpus deprives a party of the right of appeal which otherwise would exist?

The dissenting opinion maintains that, "The writ of habeas corpus would not afford complete relief*****. If the materiality of the testimony of the witness or his availability at the trial are controverted at all, the writ of habeas corpus would not afford relief. Let it be supposed for instance that, in opposition to the affidavit of the district attorney to the effect that the witness was present when the acts now under investigation were committed, the witness had submitted convincing proof that he was elsewhere or that he had established overwhelming evidence that he would be available at the trial. Nevertheless these issues of fact, no matter how conclusively established in favor of the witness, could not be considered on habeas corpus. Such issues could, however, be considered on appeal from the order and the determination corrected if found not to be adequately sustained by the proof. I fail to understand, therefore, on what theory it can be held that the statute (§618-b), which provides that a bond may be required to be furnished by a material witness after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, does not provide an opportunity to develop the facts so that they may be reviewed by appeal not habeas corpus. I dissent from the dismissal of the appeal and vote to consider the appeal on the merits."

The precedents cited in the prevailing and dissenting opinions are of equal weight. In the Second Department of the Appellate Division, such orders as these were held not appealable. (People v. Doe (Reubenstein), 259 App. Div. 921, and People v. Doe (Workman), 259 A.D. 1027.)

The Fourth Department of the Appellate Division has taken the contrary view in Matter of Di Piazzi, 234 App. Div. 302, and Matter of Prestigiacomo, 234 App. Div. 300. The last two cases were distinguished by the majority from the case at bar on the ground that in these cases, the question of vacation of the order was involved.

The question will remain open until either judicial action by the Court of Appeals or legislative action shall determine the right of appeal for such petitioners.

JOHN EDWARD DICKINSON

N O T E S

THEODORE v. DAILY MIRROR, INC., - EVIDENCE IN LIBEL CASES.- The plaintiff in this case (282 N.Y. 345) sued to recover damages because of an alleged libelous editorial which the defendant published concerning him. The defeat of the so-called "Economy Bill" provoked the editorial which charged that the opponents of the bill preferred cheap, political success to the interests of the public. It quoted the plaintiff, then a member of the Assembly, as saying: "I would vote against this Bill even if the City of New York or the United States Government went bankrupt." The evidence adduced at the trial established that this statement was taken out of its context and did not truly state the gist of plaintiff's remarks, since the quoted statement was immediately preceded by the assertion that a vote for the Bill would be an abdication to the Board of Estimate and apportionment of the constitutional powers of the Legislature. The defendant, in its answer, alleged that the editorial quotations had been a fair and true report of a legislative proceeding. This defense was discussed in a previous case between this plaintiff and a different defendant, but arising out of a similar libel growing out of the same incident. In that case, the trial court, in awarding a judgment for the plaintiff, maintained that the variance between the words quoted and the total words uttered by plaintiff, was such as to change the entire import of plaintiff's language, making it falsely appear that plaintiff held, and in fact, gave public expression to views unbecoming to a public official and subversive of good government. The decision of the trial court was affirmed without opinion in Theodore v. News Syndicate Co., Inc., 245 App. Div. 703, 270 N.Y. 603.

It would seem, then, that, in certain cases, it is libelous to print verbatim, the plaintiff's own statements. This is not so shocking as it would seem, for this case aptly illustrates that the defendant can, by quoting only a part of an integrated statement, completely alter the intended meaning of the speaker. Surely, especially in a case such as this, the rules of law should require that any preceding or subsequent statements which refer to the same subject, and tend to qualify or modify a statement which, standing alone, seems improper, should also be printed in order to show the true meaning of the statement taken as a whole. I agree that the law should impose liability on those who print, in such a case, only a part of the statement, for, to my mind, there is no distinction between this and an actual misrepresentation or a deliberate misquotation.

Another aspect of the case presents an interesting question of evidence. On direct examination, the plaintiff took credit to himself for social service work and for membership in several professional and fraternal organizations, with no objection from the defendant. On his cross-examination, the plaintiff was made to admit that there were unpaid judgments against him for office rent and merchandise, for money lent and for work and services. Plaintiff's objections thereto were overruled by the trial judge be-

cause, as he said, "it may all go to the character and reputation of the individual." The plaintiff-appellant appeals mainly on this ground, claiming the above rulings to be error.

The Court of Appeals held that this cross-examination was improper and necessitated a reversal and a new trial. The Court held that when the plaintiff testified to his beneficent conduct, his actual character did not become the issue, and that the defendant was not thereby entitled to cross-examine on the facts unrelated to the libel.

In an action for libel, the plaintiff is suing for damage to his reputation only, for no number of harsh words are capable of impeaching his character. In a civil action the general rule is that evidence of character is inadmissible as a probative fact, unless actual character is in issue. This rule is clearly stated in Taylor v. Heft, 150 A.D. 509. Therefore the defendant should have objected when the plaintiff sought to show that he was connected with benevolent organizations, for in this way plaintiff sought to bring before the jury certain aspects of his character which were wholly irrelevant to the main issue of the case. But the fact that the plaintiff was enabled to present incompetent evidence, solely due to the error of the defendant's counsel, did not by any means permit the defendant then to bring in further irrelevant matter which had a tendency to impeach improper evidence given by the plaintiff.

Cross-examination of this sort might within limits have been legitimately directed to the credit of the plaintiff as a witness, but no such ground of admissibility was alleged by the defendant. Moreover, in People v. Montlake, 184 A.D. 578, the defendant alleged error in that the trial court allowed the People to show that one of the defendant's witnesses did not pay the rent of his restaurant, but moved out leaving it unpaid. The court there said, "This was an unwise exercise of discretion. The fact that the witness had not paid a certain debt, which was in no way connected with the case on trial, did not tend to show moral turpitude on the part of the witness." And, in Holmes v. Jones, 147 N.Y. 59, the court said, "It is well settled that a defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities, but can attack only the plaintiff's general character."

Where actual character is in issue, it is presumed that a party is forewarned that his character as to the particular trait in question is liable to attack, and that he will be prepared to defend it. But wherever character is simply relevant to the issue, the law only presumes that a party will be able to defend his general character by the speech of people, but he could hardly be prepared to answer and account for every questionable, immoral, or disgraceful act that he has ever committed. Therefore character, when not in issue, may be shown by reputation alone. But even this privilege is denied in actions for libel or slander where reputation is not a material issue, for it is considered futile to show that which the law presumes, and because the character of the plaintiff does not form the basis of recovery.

Here, the plaintiff's character for paying his debts was not in issue. Only his faithfulness to the trust with which he had been endowed by the public had been subjected to attack. Therefore it was obviously improper for the court to allow the defendant to introduce this wholly immaterial and somewhat prejudicial evidence. The rules of evidence were designed to guarantee each litigant a fair trial on the issues presented by the pleadings, and it is just such proof as this that rules are intended to exclude. Even if such evidence is not prejudicial, it should be excluded for it has a decided tendency to confuse the issues and mislead the jury, thereby lessening the other party's right to a trial by jury on the issues.

E. A. T.

* * * *

KRAUSE v. KRAUSE - RIGHT OF ELECTION BY THE SURVIVING SPOUSE.- The Decedent Estate Law §18 provides: "Where a testator dies after August 31st, 1930, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section."

The difficulty which has arisen since the adoption of this statute springs from the attempts by a spouse to effectually transfer his property inter vivos, while retaining the benefits and income therefrom during his life, so as to defeat the surviving spouse's right of election. There are two conflicting rights which the courts are trying to protect in all these cases. The first is the inherent right of an individual freely to alienate his property during his lifetime. The second is the statutory right of the survivor to share in the estate of his or her spouse. The Court of Appeals in the leading case in New York, Newman v. Dore, 275 N.Y. 371, decided that transfers by a testator defeating the survivor's right of election were merely "illusory." However, the Court did not clearly define the limits of a testator's power to alienate his property during his life. The recent decision of Krause v. Krause, 285 N.Y. 27, is interesting because it apparently shows a legal means by which a testator can successfully defeat the right of his surviving spouse to participate in his estate.

The facts of the case are, briefly: Testator married in 1932. He had at that time three adult children. Six months prior to his death in 1938, he gave two warranty deeds to his sons. Each deed conveyed to the grantee a parcel of real property, "Reserving, however, to the grantor, Gustav Krause, the use, the rents and the profits of the hereinbefore described premises for the remainder of his natural life." The widow sought to set aside the transfers as mere cloaks for transactions that were

basically testamentary in character. The Court held the deeds to be outright conveyances of fees subject to a life estate in the grantor. The importance of the decision, it seems to the writer, lies in the attitude of the Court toward the voluntariness of the transfers. The Court said: "We cannot find in §18 of the Decedent Estate Law any suggestion that such a conveyance by a husband or wife was ever to be defeated by the other spouse merely on the score of its being voluntary. Rules having to do with voluntary conveyances as frauds upon creditors having no bearing in this connection. In Newman v. Dore, supra, we approved a statement of the now relevant law which had been formulated by the Supreme Court of Pennsylvania in these words: 'The good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of the property. It is, therefore, apparent, that the fraudulent intent which will defeat the gift inter vivos cannot be predicated on the husband's intent to deprive the wife of her distributive share of his property.'"

Once again the court refused to review the purpose and intent of the testator's transfer. The Newman case has been criticized on the ground that the opinion minimizes too much the effect which should be given to a husband's deliberate effort to deprive a spouse of her property rights vouchsafed to her by the Decedent Estate Law as it now stands. (See 23 Cornell L.Q. 457; 37 Columbia L. Rev. 1219). The same criticism might well be directed at the decision in the Krause case. There seems to be no good reason for the refusal of the court to close its eyes to an attempt by the testator to deprive his wife of a valuable property right.

There are collated, in two annotations in American Law Reports Annotated, many cases on the subject of transfers by a husband in derogation of the anticipatory rights of the wife to inherit by intestacy or under his will. (64 A.L.R. 466; 112 id. 649.) "The general rule to be extracted from the cases appears to be that a gift inter vivos by a husband, if absolute and bona fide, and not made with a fraudulent intent, is not a fraud on the right of the wife to share in her husband's property at his death; but that, if the gift is merely colorable, that is, if the transfer was apparently a gift, but in reality a mere device by which the husband is enabled to use and enjoy his property during his lifetime, and at the same time to deprive his wife of her property rights at his death, or if the gift is made with fraudulent intent, then it is a fraud on the wife's rights." (64 A.L.R. 467) "By absolute is meant an irrevocable, final and bona fide transfer of property without consideration. The term bona fide as here used does not refer to the motive for making the gift, whether to deprive the wife of her property rights or not, but rather to the intent of the donor to divest himself of title to the property." (64 A.L.R. 472) For further statement of the general principle, see 30 C.J. 523 §39.

Justice Aldrich, in the case of President & Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, has set forth three

general classes of trusts created by a husband during his lifetime so far as the claim of a widow under the Decedent Estate Law is concerned:

1. There may be an absolute conveyance in trust by the husband during his lifetime irrevocable in form and under which he parts absolutely in good faith with all ownership over the trust property and surrenders all dominion thereover. Such a trust, otherwise valid, is equally valid against any claim of the widow under the Decedent Estate Law. (Newman v. Dore, supra).

2. There may be a transaction where the reserved rights of the donor are so extensive in various matters that the alleged trustee is merely the agent of the donor and, in legal effect, merely a custodian, without discretion and without authority. Such a transaction does not pass any title from the donor and such property passes as his estate upon his death. (Newman v. Dore, supra, which cites Restatement Trusts §57 Subd.2; Matter of Ihmsen, 253 App. Div. 472.)

3. There may be a situation where a trust is created, generally lawful, but under which the reserved control of the donor is so great as to render it illusory or unreal as against a surviving widow whose rights are thereby prejudiced.

The Krause case apparently falls within the first rule as stated above. Apparently the Court of Appeals refuses to adopt the language used in Matter of Curley, 245 App. Div. 255, aff'd 269 N.Y. 548. The Court said there, "Since §18 of the Decedent Law has been in effect, a surviving spouse has a new right which should not be whittled down by the ingenuity of the draftsmen of a will or by the design of the husband to deprive the wife of her lawful rights." The intent of the testator to deprive his spouse of her beneficial interest in his estate will not be considered by the court in determining the bona fides of an inter vivos transfer of his property. One may successfully circumvent the statute by transferring his property and retaining therein a valid life estate

J. W. B.

* * * *

PLEA OF GUILTY NOT MADE IN OPEN COURT.- A decision which contained much of public interest was handed up on April 15, 1941, by Mr. Justice Patterson at Special Term of Supreme Court in Westchester County, when the Justice denied the application of a petitioner for writ of habeas corpus. The application was based upon the claim that petitioner's plea of guilty was not made in the courtroom, but in an adjacent room. The Code of Criminal Procedure §335

provides that such a plea can be made only by the defendant "in open court." In the case at bar, the room in which the plea was made was about 10 or 15 feet from the judge's bench located in the main body of the courtroom. (People ex rel. Walsh v. Warden of Sing Sing Prison, 265 N.Y.___.)

Although the court was of the opinion that the requirement of §335 is merely procedural and not jurisdictional in nature, other cases of a similar nature would seem to indicate otherwise. Regardless of what the outcome of this question may be, there would seem to be another question of grave concern in whether under any circumstances a plea of guilty should be permitted in any other place than the courtroom.

In Matter of Rudd v. Hazard, 226 N.Y. 302, decided in 1935, the Court of Appeals said flatly that the provisions of §335 and the other sections governing arraignment, plea, and judgment are matters of jurisdiction. In that case, the District Attorney of Oneida County sought a preemptory order of mandamus to compel the county judge to cause to be expunged from the records of county court all proceedings in a criminal action against one Joseph George, who had pleaded guilty to second degree assault before the Special County Judge. The regular County Judge adjourned court on December 22, 1931, until January 5, 1932. On December 28, 1931, George's plea of guilty was entered, and sentence was pronounced. The Court of Appeals ruled that since there was no regular term of court the order must issue, and George must stand trial on the original indictment, which charged first degree assault. "A plea of guilty must be put in 'in open court'", the Court said, "and 'must be entered upon the minutes of the court.' The Code provisions merely embody the immemorial usage of the common law. Publicity, not secrecy, in arraignment, plea, and judgment is part of our tradition. It is deemed necessary not only for individual security but also in the public interest. Only at stated terms, where the general public is advised of the time and place of sessions, both regular and adjourned, is such publicity possible

"Since the matter is one of jurisdiction, the fact that all parties went voluntarily before the Special County Judge does not change the result."

The insistence by the courts that proceedings be in open court was clearly shown in the holding of the Appellate Division in People ex rel. Childs v. Extraordinary Term, 184 App. Div. 829. In that case the Governor had ordered an extraordinary term of the Supreme Court, and as part of his order, decreed that notice of the term be published once a week for two weeks, in two named newspapers. The notice was correctly published in one newspaper, but the other - instead of publishing once a week for two weeks - published two notices in one week. The Court set aside the conviction of the relator, declaring, "The requirement that 'the sitting of every court within this State shall be public and every citizen may freely attend the same' (Judiciary Law Art.4; Consol. Laws Chap.30; Laws of 1909 Chap.5) does not merely mean that the doors are to be open to all when the court is in session, but also

that the general public shall be advised of the time and place of the holding of the terms of the courts." The decision in the Childs case was arrived at rather reluctantly because it meant that a series of convictions would be upset, but the Court felt that a fundamental right was being taken away.

In reviewing the privilege given newspapers publishing accounts of judicial proceedings, the Court of Appeals in another case (Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245) said: "The obvious reason (for grantin) the privilege) is the public interest in having proceedings of courts of justice public, not secret, for the proper administration of justice. For that reason it was early provided by statute in this State that 'the sittings of every court within this State shall be public and every citizen may freely attend the same.' The public generally may not attend the sittings of the courts, but they may be kept informed by the press of what goes on in the courts."

It will be seen from these cases that the judiciary is jealous of the rights accorded both the accused and the public by the "open court" provisions. Particularly today, when in so many countries the historic rights of individuals are being trampled underfoot, it seems that the precedent which would be permitted by the Walsh case should be strenuously opposed. One of the most distinguishing marks of the American system of administering justice is the open-and-above-board manner in which it is done. The Star Chamber and "back room" proceedings have never found favor with either lawmakers or judges under the American system. Any diminution ofthe strict requirements imposed by the letter and the spirit of our criminal jurisprudence is fraught with danger. The Walsh case holding would seem to tend toward such diminution.

P. H. F.

* * * *

CLASSIFICATION OF DRAFTEES AN ADMINISTRATIVE ACT, NOT A JUDICIAL FUNCTION.- Petition of Soberman, 37 Fed. Supp. 522, was a proceeding in the matter of the petition of Arthur B. Soberman for an order directing the members of Local Board No. 147, created pursuant to the Federal Selective Service Law, to reclassify and grant deferment to the petitioner.

The petitioner requested Local Board No. 147 to place him in Class 3-A on the ground that he was the principal and main support of his parents and of his sister, a girl 18 years of age. The Local Board refused his request and placed him in Class 1-A. He appealed his case to the Appeals Board, pursuant to the provisions of the Selective Service Act, which body refused to alter his classification.

The court denied the petition and held that the Federal District Court was without jurisdiction to review the action of

the Board since the act of the Board in classifying the registrant involved "no judicial function" and was purely "an administrative act."

In so holding, the court followed a decision made under the Selective Service Act of 1917 (U.S. ex rel. Roman v. Rauch et al, 253 Fed. 814). There the question was, whether a writ of certiorari could issue to review classification by a local board. The court, speaking through Judge Hough said:

> In my judgment it is not a suitable method of proceeding against a local board created by the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76) and it is not [a suitable method] for a reason which, with very abundant citations of authority, is set forth in the textbooks as follows:
>
> 'In order to use the writ of certiorari, the question shought to be raised by the writ must relate to a judicial function. What is a judicial function', says the writer, 'does not depend solely upon the mental operation by which it is performed or the importance of the act; regard must be had to the organic law and to the division of the powers of government. It is not enough to make a function judicial that it requires discussion, deliberation, thought and judgment; it must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary or at least which does not belong to the legislative or executive departments.'

In the Soberman case, the court points out that the case at bar differs from the Roman case in that Soberman is seeking a remedy by petition while Roman was seeking a remedy by way of certiorari. The court then says that in substance the proceeding is the same, namely a review of the classification.

Perhaps some would quarrel with the Court in its selection of a definition of a judicial function but it seems that the exigencies of the situation dictate such a holding. Once the right of a judicial review is established the courts would be overcrowded with petitions for review of the classification of registrants and the draft machinery would be slowed up interminably The present Selective Service Act provides for an appeal to be taken to the Appeals Board and an appeal from their determination can be taken only to the President of the United States.

The court points out that if as a result of undue process the petitioner were in the custody of the armed forces of the United States, a writ of certiorari might issue in support and aid of a writ of habeas corpus. Thus there would possibly be presented a review of the proceedings which led to the induction.

J. E. R.

* * * *

LAAGE v. LAAGE - ANNULMENT FOR FRAUD.- The judiciary in the person of Justice Pecora stampted a heavy boot of disapproval on the policies of Messrs. Hitler and Mussolini in a decision handed down in Supreme Court, New York County, April 14th, this year. The plaintiff-wife was granted an annulment in Laage v. Laage, 176 Misc. 190, on the ground that the defendant represented that he was a naturalized citizen of America while in fact he was a German citizen.

When defendant proposed marriage after a two-weeks' courtship, plaintiff, knowing that he was a native of Germany, asked whether he had become naturalized. He showed her his first papers. She believed his representation that he had since obtained his final decree of naturalization but had lost the certificate. She married him on May 31, 1938. She states that she would not have married him had she known that he was not an American citizen.

Following the outbreak of war between the British Empire and Germany, the defendant, who had gone to Canada on business, was there confined in a concentration camp. He was refused the right to re-enter this country because of his status. It was then that plaintiff learned of the falsity of his representations. The parties had cohabited as husband and wife for over a year.

Counsel for the defense urged that defendant's misrepresentation as to citizenship was not a fraudulent misrepresentation which went to the essentials of the marriage relation and that, therefore, there was no ground for annulment. Justice Pecora pointed out, however, that since DiLorenzo v. DiLorenzo, 174 N. Y. 467, it has been held that fraud need not necessarily deal with the essentials of the marriage relation but that any fraud is sufficient if "had it not been practiced, the party deceived would not have consented to the marriage", and if it be "of such a nature as to deceive an ordinarily prudent person." These conditions are met here.

On cross-examination, plaintiff admitted that she probably would have married defendant had he been British. Defense counsel contended that if the court granted an annulment in this instance, it would be the placing of a judicial stigma upon an individual because of his German citizenship. Plaintiff said that her objections were not to the place of birth but to the form of government of the native land.

The immediate reaction is that there is merit in defense counsel's plea. However, the basis of the decision is fundamentally sound. The fact that the defendant's status was a material fact in plaintiff's eyes is not the fault of the court. There is now reasonable ground to sustain the contention of the plaintiff that it was material. What woman would want to leave this country, now, for life in Germany? A German citizen is always subject to recall home. Although an American woman does not now lose her citizenship by marriage to an alien, and although she need not follow him to his own country, she would be continually threated with the alternative between that and a separa-

tion from her husband. The court points out that if she bears children abroad they become (in this case) German citizens. The wife should have the right to desire and to insure that her children will be Americans.

In Shonfeld v. Shonfeld, 260 N.Y. 477, an annulment was granted because the wife falsely represented that she would give plaintiff $8,000 after their marriage. A misrepresentation of American citizenship would certainly appear to be equally material.

A. N.

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